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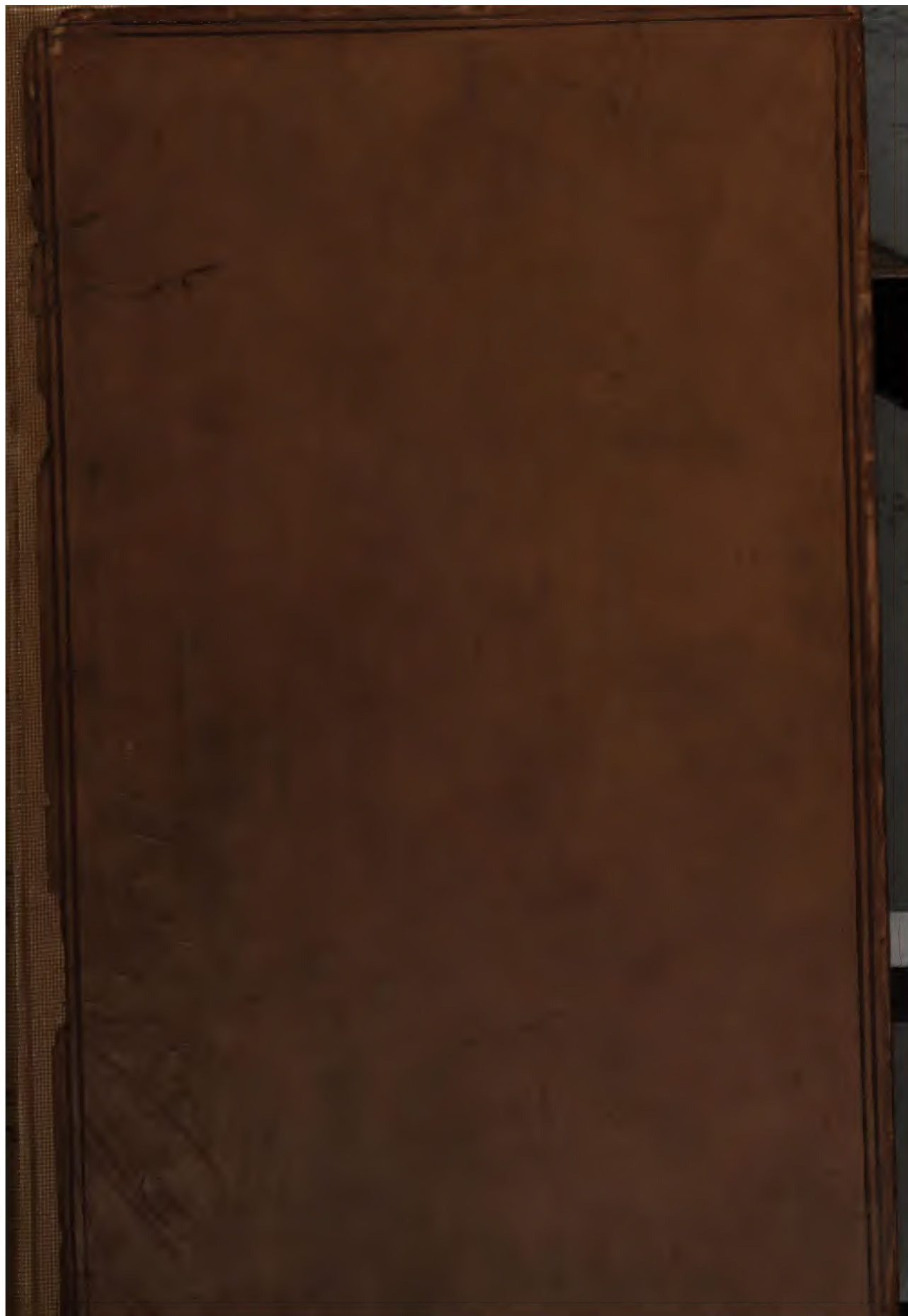
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Also



REPORTS
OF
CASES IN CHANCERY,

ARGUED AND DETERMINED

IN
THE ROLLS COURT

DURING THE TIME OF

THE RIGHT HONORABLE
SIR JOHN ROMILLY, KNIGHT,
MASTER OF THE ROLLS.

BY
CHARLES BEAVAN, ESQ., M.A.
BARRISTER AT LAW.

VOL. XVII.
1853, 1854.—16 & 17 VICTORIA.

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1854.

A

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IN
T H E R O L L S C O U R T .

LOVELL v. GALLOWAY.

1853.

Marth 18.

April 12, 21.

THE Defendant *Galloway* had effected assurances in the *Phœnix* Fire and Life Assurance Company, upon certain premises at *St. Ubis* in *Portugal*, and upon his stock in trade, consisting of large quantities of cork. In 1852, a fire took place, by which, it was said, a considerable quantity of cork had been burnt, together with some part of the premises. The loss was alleged to amount to about 9,000*l*. The company instituted inquiries as to the circumstances of the case, and having ultimately refused to pay the claim, *Galloway*, on the 11th of *December*, 1852, brought an action

Practice under the statute, in cases of injunctions to stay proceedings at law.

Though a party may now at law examine his opponent, he is still entitled to a discovery in equity in aid of his case at law.

Where the Plaintiff in a bill of discovery in aid

of a defence at law has a *bonâ fide* case, verified by affidavit, showing that information may be given by the answer, which may assist him in wholly or partially destroying the case made against him at law, he is entitled to that discovery and to an injunction until the discovery is given.

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action against them. The company pleaded fraud, and, in the name of their secretary, filed their bill against the Defendant for discovery in aid of their defence at law. The Plaintiffs stated, that they could not, as they were advised safely proceed, to defend the action without the discovery sought by the bill; and under the peculiar circumstances of the case, and having regard to the difficulty of investigating the accounts necessary to be investigated, in order to arrive at any satisfactory conclusion as to the correctness or otherwise of the Defendant's claims against them, such discovery could not be effectually obtained at law from the Defendant, and that they expected such discovery would be material to their defence at law. The bill stated, that the bill was filed *bonâ fide* and not to create delay, and prayed for discovery, and an injunction to stay the proceedings at law, until the answer should be put in. In support of the bill, the Plaintiffs filed affidavits, in which the statements submitted to the company by the Defendant were questioned, as regarded the quantity and quality of the cork, the state of the premises generally, and the truth and sufficiency of the books and accounts, which the company had sent over an agent to examine. The Defendant filed counter affidavits, and the motion for the injunction to stay the trial at law now came on to be heard.

Mr. *R. Palmer* and Mr. *Druce*, for the motion, referred to 15 & 16 *Vict.* c. 86. s. 58, and relied on *Senior v. Pritchard* (a).

Mr. *Roupell* and Mr. *W. Hislop Clark*, *contrâ*. The Plaintiff at law (*Galloway*) will have to make out his case.

(a) 16 *Beav.* 473.

case. This is a purely fishing bill, and the discovery asked is merely for delay and unnecessary, for the Defendant may now be examined at law, under the 14 & 15 Vict. c. 99, s. 2. Ample opportunity has been given to the Plaintiffs in equity to examine the Defendant's books, &c., every document being freely laid before them; and the Courts of Common Law can now compel their production; 14 & 15 Vict. c. 99, s. 6. A person who can be examined as a witness at law cannot be made a party to a mere bill of discovery (a). A Plaintiff's right to discovery is, at all events, limited to that which may assist him in his defence at law, but he is not entitled to a discovery of the case of his antagonist.

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The MASTER of the ROLLS.

The defence to this application arises from a misapprehension of the practice, as it exists under the 58th clause of the act of last session. For the purpose of rendering plain the statements I am about to make, with respect to what I conceive to be the practice of the Court under that section, it is necessary shortly to refer to the practice of the Court before that statute passed, both with reference to bills of discovery and to common and special injunctions.

Formerly, the common injunction to stay proceedings at law could not be obtained upon affidavit, but only upon default of appearance or answer within the time limited by the practice. When a sufficient answer had been

(a) See *Fenton v. Hughes*, 7 Ves. 287 (1802); *Few v. Guppy*, 13 Beav. 457 (1830); *Glyn v. Soares*, 3 Myl. & K. 450 (1835); *Glyn v. Soares*, 1 Y. & Coll. (Ex) 644 (1835); *The Queen of Portugal v. Glyn*, 7 Cl. & Fin. 466 (1837); *Irving v. Thompson*, 9 Sim. 17 (1839); *Kerr v. Rew*, 5 Myl. & Cr. 154 (1840).

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been put in, the Plaintiff could not retain the injunction, unless he could found his title to it upon some statements appearing in the answer, otherwise the Defendant was entitled to have the injunction dissolved.

But in cases of special injunctions, the Court proceeded entirely on affidavit; and without entering into the question, whether an answer was to be treated as an affidavit and might be contradicted or not, it may be stated, generally, that upon special injunctions, the question was tried and decided upon the merits appearing upon the whole of the evidence.

In that state of the practice, the Commissioners recommended and Parliament passed a clause in these words:—"That the practice of the Court of Chancery, with respect to injunctions for the stay of proceedings at law, shall, so far as the nature of the case will admit, be assimilated to the practice of such Court with respect to special injunctions generally, and such injunctions may be granted upon interlocutory applications, supported by affidavit, in like manner as other special injunctions are granted by the said Court."

Two objects are apparent upon that section—one is, that an abuse which had frequently occurred in the practice of this Court should be remedied, viz., that a Defendant at law who seeks to stay an action shall not, in future, be at liberty to obtain an injunction as of course, by putting on record a bill containing a merely fictitious case, praying for very long and complicated accounts, and making statements which it might be extremely difficult for the Defendant to answer. In the report of the early Chancery Commission, in 1826, some very striking instances are detailed in the evidence there

there given(a). It was therefore considered necessary, that a Plaintiff, on filing a bill to stay proceedings at law, should verify his bill and show, that he had not stated a mere fictitious case. All that was meant by this was, that he should verify such statements as were within his own knowledge, and state on oath that he believed those statements which rested upon the information of others, or on the inferences to be drawn from those facts. It was not intended to prevent him making charges, for the purpose of drawing from the Defendant a full discovery of all he knew about the facts so stated. The other object of the section is this:—when the answer is put in, the Plaintiff is not then to be precluded by it, but if there are facts stated in the answer which the Plaintiff knows to be untrue, he is at liberty to bring forward evidence to satisfy the Court, that the statements in the answer are not correct, and the Court may then deal with it as it shall think fit.

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If the legislature had meant to restrict all injunctions to the precise practice which prevails in the case of special injunctions of that description, and to deprive the Defendant at law of the benefit of the discovery he formerly had, this section of the act of Parliament would never have introduced the qualifying words, "so far as the nature of the case will admit." It would have omitted those words altogether, for the cases would have been literally and precisely the same. But the great assistance which it was supposed a Defendant to an action at law derived, who had a *bonâ fide* case known only by the Plaintiff, which might either destroy the whole of his demand or cut it down to a very moderate extent, was this:—that he might extract the evidence of it from the admission of the Defendant

(a) See the evidence of Sir L. Shadwell, p. 206.

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Defendant himself, and that was called giving the Plaintiff the benefit of the discovery. That has always been considered to be of the greatest value. If I were to allow a Defendant to make affidavits, instead of putting in an answer and giving the discovery required, and if the action at law is to go on in the mean time, by what possibility could the Defendant at law have the benefit of this discovery? It will be given after the action has been tried, and the jury have given their verdict, and possibly after execution has been levied for the full amount. And when the discovery is given, which may be such, as would have prevented the Plaintiff at law from obtaining the whole or a portion of his demand, it will no longer be available, and the Plaintiff in equity may not be able to obtain the slightest advantage from it.

It was argued, that the Plaintiff in equity is not entitled to any further discovery than what may assist him in his defence, and that he is not entitled to discover the case of his antagonist. That however is a question to be determined on exceptions, which is the proper occasion for determining the extent of discovery to which the Plaintiff is entitled. But to whatever extent a Plaintiff is entitled to discovery, I am of opinion, that in a *bonâ fide* case, verified by affidavit, showing the Court that information may be given by the answer of the Defendant, which may assist the Plaintiff in wholly or partially destroying the case made against him at law, the Plaintiff in equity is entitled to that discovery, and that this can only be secured to him by granting the injunction until this discovery has been given by the answer.

I have already stated that this was my view of the case, when it first came before me; and though entertaining very little doubt on the subject, I took the
 opinion

opinion of another branch of the Court. I also stated my opinion in the case of *Senior v. Pritchard* (a), which has been cited. I have thought it desirable to go into some greater detail on the present occasion, because the practice is new. I shall reserve the costs of this motion, but grant the injunction until the answer has been put in.

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(a) 16 *Beav.* 473.

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GWYNNE v. The BRITISH Peat, Charcoal, and  
Manure Company.

THE claim, in this case, was filed on the 9th of *June*, 1852, and an appearance on the 19th of the same month. On the 15th of *December*, the claim was set down for hearing, but on the 12th of *January*, 1853, the hearing was, by arrangement, ordered to be adjourned for three months or until further order; this latter order was, in the beginning of *March*, vacated by consent. On the 8th of *April*, when the claim was to be in the paper on the first day for hearing claims, an application was made to the Court to postpone the hearing, but it was refused. The Defendants prepared their affidavits on the 8th, 9th, and 11th of *April*, in expectation of the hearing; but on the 12th of *April*, the Plaintiff applied for and obtained the common order to amend, and served it the same day on the Defendants. On applying for the common order, the Plaintiff did not state the fact of the claim having been set down for hearing.

*April* 21, 23.

The common order to amend may be obtained after a claim has been set down for hearing.

The Defendants now moved to set aside the order to amend.

Mr.

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 Company.

Mr. *R. Palmer* and Mr. *Southgate*, in support of the motion, contended, that the fact of the claim having been set down for hearing ought to have been stated upon the application for the order, and that if that had been done, the order would not have been granted. Besides, the affidavits made before the amendment might turn out to be useless, as a new case might be made by the amendment, to which they would not be adapted.

Mr. *Lloyd* and Mr. *Grove*, *contrà*, contended, that in the case of claims, the time for amendment was unlimited by any order, and that they might, therefore, be amended at any time. That, at all events, a claim might be amended for the purpose required in this case. They cited *Palk v. Clinton* (a); *Woollands v. Crowcher* (b).

*The MASTER of the ROLLS* reserved judgment in order to inquire as to the practice.

---

*April 23.* *The MASTER of the ROLLS* said, that he had inquired and found that the practice was settled, that a claim might be amended after it had been set down for hearing. He therefore dismissed the motion with costs.

(a) 12 *Ves.* 66.

(b) 12 *Ves.* 174.

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1853.

## SUMMERFIELD v. PRITCHARD.

March 18.

April 12, 14.

THE Plaintiff's father, by his will, appointed his wife, *Anne Summerfield*, and *John Pritchard*, his executrix and executor. They continued to carry on the testator's business after his death; the Plaintiff, *William Summerfield*, being at that time an infant of thirteen years of age. *Anne Summerfield* afterwards intermarried with *Robert Rosbottom*, and the Plaintiff having come of age, filed his bill against *Pritchard, Rosbottom* and wife and others, for the administration of his father's estate. The Plaintiff obtained the common order, that he, "his solicitors or agents," should be at liberty to inspect the books and papers, admitted, by the answers, to be in the Defendants' "possession, and to take copies and extracts therefrom." In pursuance of this order, the Plaintiff, accompanied by his solicitor and Mr. *Widnall* (his mother's brother), went to examine the books and papers, but the Defendants' solicitor refused to permit Mr. *Widnall* to see them. The Plaintiff now moved to commit the Defendants for disobedience of the order, in refusing to permit Mr. *Widnall*, as the agent of the Plaintiff, to inspect the books and papers; the notice of motion asked, in the alternative, for an order, that Mr. *Widnall* might, as agent of the Plaintiff, have liberty to inspect, &c., in like manner as, by the existing order, leave was given to the solicitors or agents of the Plaintiff.

An order gave liberty to the "Plaintiff, his solicitors or agents," to inspect documents in the Defendant's possession. Held, that this did not authorize the inspection by a non-professional relative of the Plaintiff, though alleged to be the only person conversant with the accounts. The Court also refused to make a special order permitting the inspection by such party.

In support of the motion, the Plaintiff and Mr. *Widnall* filed affidavits, stating that Mr. *Widnall* had been clerk to the testator, and was the only person conversant

sant

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sant with his affairs, and with the business carried on by him and continued by the executors. And further, that it had been discovered, that assets, to a very considerable amount, had come to the hands of the executors, which they had not accounted for or set forth in their answer, and that no useful result could be expected from the examination of the books, &c., unless Mr. *Widnall* was allowed to inspect them.

Mr. *Hobhouse*, for the motion. Mr. *Widnall* was the testator's clerk, and well acquainted with the accounts and the circumstances of the estate. He therefore is the party best qualified to inspect the books as the Plaintiff's agent. The Plaintiff might indeed arrive at the same result, by a much more expensive process, namely, by taking copies of the books, under the power given him by the order. There is no authority for refusing such permission to Mr. *Widnall* to inspect them. The case of *Bartley v. Bartley* (a), is very different from this, for there a Plaintiff took a Defendant with him to inspect the documents of a co-Defendant, and that was not permitted.

Mr. *John Baily* and Mr. *C. Hall*, *contrà*. There is no authority for such an order as the one asked, and *Bartley v. Bartley* is a decision to the contrary. There is no ground for making any special order in this case, for a solicitor can comprehend accounts as well as any other person, and Mr. *Widnall* could afford him such information as might be necessary for his guidance in the inspection of the books. Besides, the accounts are mostly set out in the answers; and the Defendants believe, that the application arises from improper motives,

(a) 1 *Drew.* 233.

tives, on the part of Mr. *Widnall*, who instigated the Plaintiff to commence this useless litigation.

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PRITCHARD.

Mr. *Hobhouse*, in reply. The allegations as to improper motives, and that Mr. *Widnall* instigated the suit are denied.

*The MASTER of the ROLLS.*

My present impression is, that I cannot vary from the usual practice. I will, however, consider the case.

*The MASTER of the ROLLS.*

April 14.

I am of opinion, that this is not a case, in which the Plaintiff's uncle can be considered an agent for the purpose of inspecting the documents within the meaning of the order. I must, therefore, refuse the motion.

BELL v. CARTER.

March 19.

April 12, 14.

IN *May*, 1827, *Tilson* conveyed certain lands to the Plaintiff *Bell* and his heirs, on trust, in case a debt of 6,000*l.* and interest thereon should not be paid on the 12th of *May*, 1828, to sell the same by public auction

*A.* conveyed lands to *B.*, on trust, in case a sum and interest should not be paid by a day named, to sell, and after pay-

ment of principal, interest and costs, to reconvey the lands remaining unsold, or pay over the residue of the money; and *B.* covenanted not to sell without giving six months' notice, but the deed contained no proviso for redemption. Held, that this was a mere mortgage, and that *A.* was therefore entitled to six months' time to redeem.

1853.

~  
BELL  
v.  
CARTER.

or private sale, and out of the proceeds of the sale, to pay the principal, interest and costs, and pay over the surplus, and to re-convey the unsold part of the estate to *Tilson*. The deed contained a covenant by the Plaintiff not to sell without giving six months' notice, and a covenant by *Tilson* to pay the debt and interest; but there was no proviso for redemption, as in a common mortgage. The money was not paid; and in 1846, an ineffectual attempt was made to sell the property. *Bell* alleging the property to be an insufficient security, afterwards filed his bill against the parties claiming under *Tilson*, who was dead, for a sale of the property, and for payment, out of the produce, of the principal, interest and costs.

Mr. *R. Palmer* and Mr. *J. V. Prior*, for the Plaintiffs, asked for an account and an immediate sale of the property, without allowing any period for redemption. They contended, that the deed was substantially a conveyance in trust for sale, and which trust the Plaintiffs had a right to have executed.

Mr. *Kinglake*, *contra*. The Plaintiffs are merely entitled to the ordinary decree for redemption, and not to a sale. The transaction, though peculiar in form, is a mere Welch mortgage with a superadded power of sale, for the estate is conveyed to the Plaintiff in fee, in trust, if default be made, out of the rents and profits or by a sale, to pay the debt, &c. The Plaintiff is therefore entitled to retain the estate until the debt was paid. The trust for sale is not compulsory, but to be exercised by *Bell*, at his option, upon giving six calendar months' notice; and no such notice has been given. Again, the deed contains all the usual elements of a mortgage security: there is a covenant to pay, and on payment the mortgagor would be entitled to a re-conveyance: the proviso

viso for re-conveyance differs only in form, from the ordinary reservation of an equity, or a proviso for redemption; and if this be in effect a common mortgage, the ordinary decree must be made. In all cases where the Court directs a sale, it gives six months' time to enable the mortgagor to redeem, *Seton* on Decrees (a); and the same time is given in cases of equitable mortgages, *Seton* on Decrees (b). The same rule ought to apply in the present case. To direct a sale before the accounts have been taken, will be to invert the usual order of proceedings, for after the sale nothing may turn out to be due. He cited *Parker v. Housefield* (c); *Lewis v. John* (d); *Meller v. Woods* (e); *King v. Leach* (f); *Thorpe v. Gartside* (g); *Lister v. Turner* (h).

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Mr. R. Palmer, in reply. It is plain that *Bell* had no power to foreclose; and therefore, reciprocally, *Tilson* had no right to redeem; for there can be no decree for redemption unless a default in payment leads to a foreclosure.

The MASTER of the ROLLS reserved judgment.

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I think that the Defendants are entitled to have time to redeem. The deed does not reserve any right of redemption; still it is not the case of an ordinary trust for sale, but the object of the trust is to secure a sum of money; and the trust for sale does not arise, nor is the Plaintiff entitled to have the trust for sale enforced, if

(a) Pages 178 & 180.  
(b) Page 179.  
(c) 2 Myl. & K. 419.  
(d) 1 C. P. Coop. 8.

(e) 1 Keen, 16.  
(f) 2 Hare, 57.  
(g) 2 Y. & Coll. (Ex.) 730.  
(h) 5 Hare, 281.

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if payment is made of the principal, interest, and costs; which payment at any time would prevent the trust for sale from arising. If this be so, it is clear there is a right to redeem; and the question then arises, what is the proper time to fix for redemption? I am of opinion, that the proper time to be allowed is the same as in other cases, for this is, in truth, a suit by a mortgagee to enforce his security; and the fact that no time is specified in the deed, at which, upon default of payment of the money, the legal estate is to become absolute, does not prevent the owner of the estate from having that equity which this Court enforces against a mortgagee, who comes to enforce his security. I am of opinion, therefore, that the Defendants must have six months' time to redeem.

Jan. 28.  
 Feb. 8, 9, 10.  
 April 15.

#### HELE v. Lord BEXLEY (a).

A tenant by  
*elegit* took a  
 conveyance of  
 part of the  
 lands ex-

THE first question, on these exceptions, arose under the following circumstances:—Sir *George Bowyer*,  
 being

(a) S. C. 11 *Beav.* 537.

tended, in satisfaction of part of his debt. Held, that his tenancy by *elegit* on the rest of the lands was extinguished and that his judgment was satisfied.

A creditor issued three *elegits* on three several judgments, and extended the lands of his debtor; he afterwards took a conveyance of part of them. On a question whether the tenancy by *elegit* had been wholly extinguished and the judgment satisfied, the creditor insisted, that it had not been shown that the writs of *elegit* had been duly returned, and that no evidence had been given, to show in respect of which *elegit* the lands conveyed had been extended. But held, that the *onus* of proof was on the creditor, he being bound to make out that he was a subsisting incumbrancer; and, secondly, that as it was his duty to have caused a proper return to be made and filed, he could not take advantage of his own omission.

A creditor issued three *elegits* under three judgments, and the Sheriff, by virtue of the first two, extended the whole of a leasehold estate, and returned *nil* to the third. The first two judgments being adjudged to have been satisfied at the time, held, that the creditor had acquired no rights under his *elegits*.

*A. D.*, being entitled to three annuities secured by covenant and judgment, received for twenty years part of the rents of the grantor's estates under *elegits* issued on satisfied judgments. Held, that he was not accountable for his receipts to a party having a charge on the estate who had taken no proceedings to obtain possession.

being tenant for life of the greater part and tenant in fee of the remainder of the *Radley* estate, and tenant for life of leaseholds called *Sunningwell*, granted, on the 10th, 15th and 25th of *March*, 1814, respectively, three several life annuities of 500*l.*, 333*l.* and 460*l.* to *Donovan*. The considerations paid for them respectively were 3,000*l.*, 1,998*l.* and 2,760*l.*, and they were severally secured by the covenant and by judgments, for 6000*l.*, 3996*l.*, and 5520*l.* entered up upon warrants of attorney.

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Sir *George Bowyer* afterwards, in *June*, 1814, granted six other annuities, secured on the *Radley* estate, and he appointed a receiver to secure them. On the 8th of *May*, 1815, Sir *George Bowyer* granted to the Plaintiff *Hele* an annuity of 700*l.* a year, secured on the *Radley* and *Sunningwell* estate, and, in 1815, he conveyed that estate to *Rowe*, in trust to sell and apply the produce in payment of his creditors.

Afterwards, on the 5th of *September*, 1816, *Donovan* issued three writs of *elegit* on his three judgments, returnable on the first day of *Hilary* Term, 1817, which were directed to the sheriffs of *Berkshire*, where both properties were situate. The sheriff extended and delivered one moiety of the *Radley* estate under the judgment for 5,520*l.*, and the other moiety under the judgment for 6,000*l.*, and he returned *nil* to the third. *Donovan*, however, did not immediately obtain possession of the *Radley* estate, of which the receiver of the six annuitants was then in possession. In *May*, *July* and *November*, 1819, *Rowe*, by several conveyances, conveyed parts of the *Radley* estate, called *Hardyott Meadow*, the tithes of *Gallow* piece and of 327 acres in the parish of *St. Helens*, and 18 acres 3 roods of meadow ground, to *Donovan* in fee, in part discharge of the arrears of his annuities, to the extent of the sums of 1,331*l.* 5*s.*,  
2,160*l.*

1853. 2,160*l.* and 1,400*l.* This property was included in the extents made under the *elegits*, and the Master found, that in 1819 and 1820, by virtue of the writs of *elegit* and the sheriff's return, *Donovan* had entered into, and had since retained possession of, the tithes of *Gallow* piece and *Box* field, the tithes of the 381 acres in *St. Helens* and *Hardyott Meadow* (part of the *Radley* estate). It did not appear whether the *elegits* had been returned.

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By the decree in the cause, made in *May*, 1851, the Master was directed to ascertain the priority of the incumbrances on the property; and upon the above state of facts, the Master found, that by the conveyance to the *elegit* creditor of part of the lands extended, his two judgments for 6,000*l.* and 5,520*l.* had been extinguished. He disallowed *Donovan's* claim in respect of them.

The second question related to the leasehold estate called *Sunningwell*, held for a term of 1,000 years, and which had been assigned by way of mortgage, in 1720. The mortgage had long since been satisfied, but the term had not been re-assigned. Administration was, in 1824, taken out to the mortgagee, and the term was then assigned to *Rowe*, and by him to *Donovan* in *May*, 1827, but, as the Court held, in trust for Sir *George Bowyer*, who was the tenant for life under Sir *William Stonehouse*, the person entitled to the equity of redemption.

*Donovan*, having the term, entered into possession of the *Sunningwell* property in 1828. While he was in possession, and on the 21st of *February*, 1831, he issued a writ of *elegit* upon the judgment for 5,520*l.*, returnable on the 14th of *April* then next, directed to the sheriff of *Berks*, who extended to *Donovan* one moiety of the leaseholds at *Sunningwell*, which were in the possession

session of Sir *George Bowyer* at the date of the judgment. On the same day, *Donovan* issued a writ of *elegit* on the judgment for 6,000*l.*, directed to the Sheriff, who thereupon extended to him the other moiety of the same leaseholds; and on the same day, *Donovan* issued a third writ of *elegit*, on the judgment for 3,996*l.*, in like manner, on which the sheriff returned *nil*.

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This gave rise to the second question, whether *Donovan* could be considered to be in possession of the *Sunningwell* property as tenant by *elegit*.

The third question arose under these circumstances:—When *Donovan* issued his three *elegits*, in *December*, 1816, the six subsequent annuitants were in possession of *Radley*, by their receiver, and in order to prevent *Donovan* taking possession, it was agreed, by deed of the 31st of *March*, 1817, that the receiver should continue in possession, and pay *Donovan* 385*l.* a year (being five per cent. on the consideration money paid for his three annuities). This sum had accordingly been paid, but the Master, in taking the accounts, had, in the first place, attributed all the payments made to *Donovan*, in respect of the 385*l.* a year out of the *Radley* estate, and all his receipt of rents from *Cow Mead*, *Ferryham* and *Sunningwell*, towards the discharge of the remaining judgment of 3,996*l.*, considering the other two extinguished; and he also found, that allowing him credit for the full amount claimed, he had received much more than was sufficient to satisfy the judgment for 3,996*l.*

The last question was, whether the Plaintiff (in respect of his annuity of 700*l.* a year granted by Sir *George Bowyer* on the 5th of *May*, 1815), and the other persons claiming as incumbrancers on the estate, could, as re-

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garded *Donovan*, stand in a better situation than Sir *George Bowyer*.

To this report, *Donovan* took four exceptions, of which the first and fourth related to the disallowance of the claims generally, the second to the extinguishment of the judgments for 6,000*l.* and 5,620*l.*, and the third, to the satisfaction of the judgment for 3,996*l.*

Mr. *Lloyd* and Mr. *Bichner*, in support of the exceptions. Where a judgment creditor extends lands by *elegit*, he holds *quousque debitum recuperatum fuerit*, and though liable in equity to account to the debtor for the whole he has received, he is entitled to retain principal and interest, whatever the amount of the latter may be; *Yates v. Hambly*(a); *Godfrey v. Watson*(b). And if a judgment creditor, who has sued out an *elegit* and has obtained possession, is afterwards evicted, his judgment is not extinguished, but he is entitled to come into equity for satisfaction of so much as remains unpaid; *Leahy v. Dancer*(c); *Ross v. Pope*(d). Nor is an *elegit* any bar to the creditor obtaining such satisfaction in equity, unless the writ has been regularly returned and filed; and until it is shown that it has been so returned and filed, the Court must assume that it has not, *Hoe's Case*(e). Here it has not been shown that the writs of *elegit* were returned to the Court from whence they issued; and if it were so shown, there is no evidence to satisfy the Court, as to the particular judgment or the particular writ of *elegit*, by virtue of which the lands conveyed to *Donovan* were extended. Now the extent by the Sheriff is not of an undivided moiety, but of a moiety by metes and bounds; that is, the Sheriff delivers,

(a) 2 *Atk.* 363.(b) 3 *Atk.* 517.(c) 1 *Moll.* 313.(d) 1 *Plowd.* 72.(e) 5 *Rep.* 90*a.*

delivers, not a moiety of each particular tenement, but only certain tenements, making in value a moiety of the whole; *Den v. Earl of Abingdon* (a). It is essential, therefore, that those who dispute Mr. *Donovan's* claim should show, that some part of the lands and hereditaments, conveyed to him in 1819, really formed part of the lands extended under each writ of *elegit*. The Plaintiff has failed in doing so, and therefore the exceptions ought to be allowed. They cited *Underhill v. Deveaux* (b).

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Mr. *Roupell* and Mr. *Speed*, *contrâ*. A descent of the lands on the tenant by *elegit* is an extinguishment(c); 2 *Roll's Abr.*(d), and *Lancaster v. Fielder* (e). A *fortiori*, is it an extinguishment, if the tenant by *elegit* purchases the lands forming part of his security; *Dighton v. Greenvil* (f); *Crawley v. Lidgeat* (g). The result of the authorities is, that the debt being gone by the delivery of possession by the Sheriff, the tenant by *elegit* is completely barred of all further remedy, if that which he has obtained by the delivery is any how destroyed, *Gilb. Execution*(h); for after an *elegit*, no other species of execution can be issued; 2 *Tidd's Prac.*(i); *Higgen's Case* (k); *Stafford v. Clark*(l); *Glascock v. Morgan* (m). Even by the statute(n), there is no remedy, in case of eviction out of part of the lands extended; that statute applying only to the case of an absolute eviction out of the whole, *Fulwood's Case*

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|----------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|
| (a) 2 <i>Doug.</i> 473.                                                                                                          | (g) <i>Cro. Jac.</i> 338; 3 <i>Prest. Conv.</i> 177, 178; 2 <i>Shep. Touch.</i> 363—364. |
| (b) 2 <i>Saund.</i> 69.                                                                                                          | (h) Pages 43—50.                                                                         |
| (c) <i>Co. Litt.</i> 150a; <i>Vin. Abr. tit. Extinguishment</i> , A. pl. 1, 4, 5; <i>Bro. Abr. tit. Extinguishment</i> , 31, 56. | (i) Page 1037 (ed. 1828).                                                                |
| (d) Page 495.                                                                                                                    | (k) 6 <i>Co.</i> 44b.                                                                    |
| (e) 2 <i>Ld. Raym.</i> 145.                                                                                                      | (l) 2 <i>Bing.</i> 377.                                                                  |
| (f) 2 <i>Ventr.</i> 321, 336.                                                                                                    | (m) 1 <i>Lev.</i> 92.                                                                    |
|                                                                                                                                  | (n) 32 <i>Hen.</i> 8, c. 5.                                                              |

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Case (a). The statute binds a party to the remedy in respect of the whole or nothing. It is alleged, that there are two cases the other way; *Ross v. Pope* (b) is cited; but that does not apply to the present case, for there a party was suing on a *capias ad satisfaciendum*, and afterwards took a fine of part, which did not discharge the whole. In *Leahy v. Dancer* (c), there was a total eviction of the judgment creditor, after the death of the tenant for life. It is said, that until the *elegit* has been returned and filed, it is no bar, and *Hoe's Case* (d) was cited, to show, that until the return is proved, it must be taken that there has been no return. And it is said, that if either of the *elegits* be gone by what has been done, it is not shown which it was; to this the reply is, that they are both gone. In the case of a writ of *fi. fa.*, the Sheriff need not make any return, *Com. Dig. Execution* (e), but if the return of a writ of *elegit* must be made, it was the duty of *Donovan* to show whether the return to the writs was, or not, duly made to the Court from which they issued, and whether one or both and which of them is gone. In point of law, there is no authority, except *Ross v. Pope*, adduced by the other side in support of their case, and even that was not a case of an extent. On the contrary, the cases relied upon by the Plaintiff are all consistent, and clearly show, that the purchase by *Donovan* deprived him of this tenancy by *elegit*. That was his own act, and it is in vain to say, that he did not intend that such should be the result; it may be so, but that does not, in any way, affect the question; the law says, that under such circumstances, the *elegits* are gone. This is a question entirely as to the legal effect of what has been done; when the cause comes on for further

(a) 4 Rep. 66 a; Co. Litt. 289 b.

(b) 1 Plowd. 72.

(c) 1 Moll. 313.

(d) 5 Rep. 90 a.

(e) Page 87.

further directions, the equitable circumstances may be considered, but not, as now, upon exceptions.

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Next, as to the *Sunningwell* leasehold. The Master finds, that Sir *G. Bowyer* was only equitably interested, *Donovan* himself being in possession of the legal term by assignment from *Rowe*. The interest of Sir *G. Bowyer* being merely equitable, was not subject to an extent under the 29 Car. 2, c. 3, any more than a copyhold. An equity of redemption of a mortgage in fee is not subject to an extent, nor can an equitable interest in a term be taken in execution; *Scott v. Scholey* (a); *Lyster v. Dolland* (b). Besides, if a term is held in trust not for the debtor himself, but for his incumbrancers, it is not extendible; *Harris v. Booker* (c); *Lethieullier v. Tracy* (d); *Doe d. Hull v. Greenhill* (e). It is incumbent, therefore, on *Donovan* to show, that in 1831, when he issued the three *elegits* against *Sunningwell*, it was liable to be taken in execution; and if that which is delivered by the Sheriff is not liable to be extended, the creditor can have no title, because the title is under the statute, and not by the Sheriff. It is absurd to say that *Donovan* was in by the *elegits*, for he was himself in possession of *Sunningwell*, under his legal title, at the time they were issued. It is said, that the return to one of the writs of *elegit* was *nil*; but the Master has found, that the judgment, in respect of which that writ was issued, was fully satisfied. These exceptions, therefore, cannot be sustained.

Mr. *Lloyd*, in reply. If, in a case coming within its jurisdiction, you apply to a Court of Law for relief, you must submit to a decision confined to the legal rights;

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(a) 8 East, 467.

(b) 1 Ves. jun. 431; 3 Br. C. C. 478.

(c) 4 Bing. 96.

(d) 3 Atk. 728.

(e) 4 Bar. & Ald. 684.

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so when this Court deals with purely legal questions, it must, in like manner, treat and decide them on mere legal principles. But this is not a purely legal case, it is one which involves equitable circumstances also. It is desired by the other side, to postpone the decision of the principal part of this question until the case comes on for further directions; and it is argued, that though there may be equitable circumstances entitling *Donovan* to an equitable consideration of his case, yet that they cannot be taken into account upon exceptions, but must be postponed until the cause is heard on further directions. This proposition cannot be maintained, for the reference to the Master was general, to inquire as to every incumbrance, legal or equitable, affecting Sir *George Bowyer's* property; and, consequently, equitable circumstances come within the scope of the reference; and if there are circumstances sufficient to make out a case entitling *Donovan* to equitable relief, they may very properly be taken into consideration upon exceptions. The Plaintiff seeks to confine *Donovan's* claim to the literal state of facts taken in before the Master, and he contends, that since the *elegits* are gone at law, he has no further ground for relief. But the reference to the Master was to ascertain what incumbrances there were, and it was his duty to inquire whether the precise claim made could be substantiated, and if not *modo et formâ*, then to ascertain whether any different relief, more or less, might be given. *Donovan's* claim was extensive enough to leave the whole question open, whether, if the *elegits* and the judgments to secure the respective sums are gone at law, the covenant to pay the annuity, which is a collateral security, is thereby affected. The extinguishment at law of the judgments, for the consideration paid for the annuity, was no satisfaction of the covenant to pay the annuity itself; and *Donovan* might have proceeded both on the judgments

judgments or by action on the covenant every year, and could thus have recovered payment of the annuity, *toties quoties*. The covenant to pay the annuities therefore still subsisted, and as *Donovan* was in possession of *Sunningwell* to secure them, all sums paid to him there-out must be held to have been paid in respect of those annuities.

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As to the return of the writs of *elegit*, it is the common practice not to return them until the Sheriff has been ruled so to do, upon an application to the Court. Here, the Master has found, that one was returned *nil*, but the return of the other two is not found. But if returned, there is no pretence for saying they were ever filed or put upon record; and till both, or at least the return, can be shown, the judgments are not satisfied. Nor is the proposition universally true, that the issuing of a writ of *elegit* satisfies a judgment; for you may, upon a suggestion that there are other lands in the same or in another county belonging to the debtor, have another writ of *elegit* to the same or another county; *Underhill v. Devereux* (a). As to the conveyance to the judgment creditor of part of the lands taken under a writ of *elegit* being a discharge of the whole, all the authorities cited relate to legal estates, that is, they were cases antecedent to the Statute of Frauds, which extended the writ of *elegit* to trust estates. And here we are dealing with trust estates. There having been no dealing with the 1,000 years term in *Sunningwell* from 1720 till 1824, and the mortgage having been long since satisfied, the legal term must be presumed to have been surrendered to Sir William Stonehouse; *Emery v. Grocock* (b): it passed to the trustees of his will, and is now vested in the executors of the late Lord *Bexley*, consequently *Donovan* had only a trust estate therein.

The

(a) 2 *Saund.* 69.(b) 6 *Mad.* 6.

1853. The following authorities and cases were cited :—  
  
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 Lord BEXLEY. *King v. Ballett* (a); *Hesse v. Stevenson* (b); *Knowles v. Palmer* (c); *Heydon v. Smith* (d); *Nicholson v. Revill* (e); *Harman v. Cam* (f); *Metcalf v. Scholey* (g); *Sir Gerard Fleetwood's Case* (h); *Hele v. Lord Bexley* (i); *Bac. Abr.* (k); *Burton's Compendium* (l); *2 Com. Dig.* (m); *1 Stor. Eq. Jur.* (n); *3 Sugd. V. & P.* (o); *1 Roll. Abr.* (p); *3 Prest. Conv.* (q).

*The MASTER of the ROLLS* reserved his judgment.

April 15. *The MASTER of the ROLLS.*

The facts of this case are intricate, and the questions which arise are more frequently discussed in the Courts of Common Law than in Equity, and involve learning and doctrine that is antiquated, I had almost said obsolete, and the reasoning on which they depend is, in many respects, of a very technical character.

The question which arises on these exceptions is, whether the Master is right in the conclusion he has come to, finding *Alexander Donovan* is entitled to make no claim against the estate of *Sir George Bowyer*, or whether he is entitled to any charge thereon, either on the *Radley* estate or on the *Sunningwell* estate.

Although


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|-----------------------------------------|-------------------------------------|
| (a) 2 <i>Vern.</i> 248.                 | 394 (7th ed.)                       |
| (b) 1 <i>Bos. &amp; P. (N. R.)</i> 133. | (l) Page 303, s. 925.               |
| (c) <i>Cro. Eliz.</i> 160.              | (m) Tit. " <i>Chancery</i> ," 476.  |
| (d) <i>Moore</i> , 661.                 | (n) Sects. 504, 505, 511, <i>et</i> |
| (e) 4 <i>Ad. &amp; El.</i> 675.         | <i>seq.</i>                         |
| (f) 4 <i>Vin. Abr.</i> pl. 3, 387.      | (o) Page 335 (10th ed.), and        |
| (g) 2 <i>Bos. &amp; P. (N. R.)</i> 461. | p. 38 (ed. 1851).                   |
| (h) 8 <i>Co.</i> 171.                   | (p) Page 905, pl. 6.                |
| (i) 11 <i>Beav.</i> 537.                | (q) Tit. " <i>Merger</i> ," 71.     |
| (k) Tit. " <i>Execution</i> ," D. 393,  |                                     |

Although to some extent, the facts are common to both estates, yet it will, I think, be convenient to consider the claim with regard to each estate separately. The facts relating to the claim of *Alexander Donovan*, as found by the Master, are as follows:—[*His Honor stated them.*]

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The duty of the Sheriff, when the writ of *elegit* is delivered to him, does not appear to be the subject of much doubt. It is his duty to take an inquisition by a jury, and by them to value and extend one half of the lands of the *elegit* debtor, and the inquisition ought to state the lands extended, and the value thereof. When this is done, the Sheriff should deliver to the *elegit* creditor legal possession of the moiety, by metes and bounds; and thereupon, the Sheriff should return the *elegit* and inquisition into the Court from whence it issued, which should thereupon be filed in that Court. It does not, I apprehend, make any difference in the duty of the Sheriff, that, in truth, two *elegits*, issued on judgments signed in the same term, were delivered to him together; and that the effect of that proceeding was, that both moieties of the entire land might be extended, one on each writ; he was equally bound to ascertain by inquisition, and return what lands were extended under each writ, with the values thereof. Whether this was done in the present case does not appear; the Master's report is silent on the subject, and no evidence seems to have been given before him on the point. I shall presently have to consider the effect of the absence of all evidence on this subject.

The Sheriff, it is said, only delivers legal possession, and the actual possession can only be obtained by further proceedings. Accordingly, the Defendant *Donovan* does not seem, at first at least, to have obtained possession of any hereditaments under the writs of *elegit*, but the effect

1853. effect of it was this: [*His Honor here stated the*  
 *agreement between Donovan and the six annuitants, his*  
 HELE entry under the elegits, and the conveyances to him of  
 v. Lord BEELEY. *part of the property.*]

The Master finds, that all the property of Sir G. Bowyer conveyed by these deeds was also included in the extents made under the *elegits* issued in the year 1816, but he does not state which of these hereditaments were taken under each *elegit*, and it is inconsistent with his finding, that they were all taken under either of them. This is certain, that they could not have been taken under both, inasmuch as the Sheriff does not deliver an undivided moiety, but, as I have already stated, a moiety by metes and bounds, and of which moiety the value is specified in the inquisition and return to the writ.

Upon this state of facts, the Master has found, that the two judgments for 6,000*l.* and 5,620*l.* are extinguished, and this is the subject of the second exception. It is not, I apprehend, disputed, on either side, that if a tenant by *elegit* take a conveyance of the reversion of the lands extended to him, or of any portion thereof, the tenancy by *elegit* is extinguishable, as to the whole of the lands extended. And it is also settled law, that when an *elegit* is executed, by extent upon the lands of the Defendants, and is returned and filed, it is a full satisfaction, in law, and an end of the suit. If therefore these writs were duly executed and returned, it would seem to follow in this case, as a necessary consequence, that if the Sheriff had extended to *Alexander Donovan* any portion of the lands and hereditaments so conveyed to him by the indentures of 1819, the judgment in respect of which the lands were so extended was thereby satisfied and extinguished.

On behalf of the exceptant, however, it is urged,  
 first,

first, that the judgment is not satisfied by the extent, unless the writ of *elegit* be duly returned into the Court from whence it issued, which, in this case it was not, and secondly, that even if this were decided against him, there is no evidence to satisfy the Court, in respect of which judgment or in respect of which writ of *elegit* those lands were extended, which were conveyed to *Alexander Donovan*. That as the extent is of a moiety, set out by metes and bounds, it is essential for the Plaintiff or for those who dispute the claim of *Alexander Donovan* to show, that some part of the lands and hereditaments conveyed to him by the indentures of 1819 were, in truth, part of the lands extended under each writ of *elegit*, and that upon the examination of the parcels, this does not appear to be the case.

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Certainly, on this part of the case, I have felt considerably embarrassed by the obscurity of the facts. The three conveyances of 1819 are silent with respect to any question as to whether the lands so conveyed were taken by either or both *elegits*. And although I have gone through the papers as carefully as I could, I have been unable to discover, which of the lands and hereditaments conveyed were included in each extent, or whether they were all included in one, or in fact (except from the circumstance that they are part of the *Radley* estate, of which both moieties were extended) whether these hereditaments were included in either of the extents?

In this state of circumstances, I have considered on whom the burthen of proof properly lies; and I am of opinion, that the necessity of proving his case falls on the Defendant *Alexander Donovan*, who is bound to make out, under the decree, that he is a subsisting incumbrancer on the *Radley* estate, in respect of the  
 judgments

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judgments obtained by him. I am of opinion that if the writs of *elegit*, the inquisition taken thereon, and the lands extended, do not appear by the return thereof duly filed, that he might and ought to have caused such return to be made and filed, and that it was not in the power of a mere stranger to do so; or if in his power, that it was not his duty to do so, and that the Plaintiff cannot be prejudiced by such omission, and if such return was not duly made and filed, that the Defendant *Donovan* cannot now either complain of or derive any advantage from that circumstance.

I am of opinion, therefore, that I must, in the absence of evidence on this subject, take the case most strictly against the Defendant *Donovan*, and as he has taken a conveyance to himself in fee, of lands and hereditaments which the Master finds he was already in possession of as tenant by *elegit*, I am of opinion that his tenancy by *elegit* on the rest of the property extended is extinguished, and that the judgments in respect of which they were issued were satisfied. The consequence will be that the second exception must be disallowed.

I am now to consider the case so far as regards the claim of the Defendant *Donovan* in respect of the *Sunningwell* leasehold estate. The facts relating to it, as found by the Master, are as follows: [*His Honor here stated them.*]

It is contended, on the part of the Plaintiff, that as there was no dealing with the term from 1720 till 1824, it must be presumed to have been satisfied and duly surrendered, and that consequently, the legal interest in this term must be presumed to have been in Sir *William Stonehouse* and to have passed to the trustees of his will, and that consequently, it must now be vested in the executors of the late Lord *Bexley*. But I have not  
concurring

concurred in that argument. This was not a term attendant on the inheritance, but a term in gross, and to have presumed a surrender to the reversioner, would have destroyed Sir *William Stonehouse's* estate; and no authority has been cited to me, nor am I myself aware of any, where, under these circumstances, a reassignment of the term has been presumed. I think, therefore, that the legal interest in the term is, in the circumstances I have mentioned, vested in *Alexander Donovan*, in trust for Sir *G. Bowyer* and the other persons beneficially interested therein; and I think, therefore, that this term would, under the 10th section of the Statute of Frauds, have been extendible at the suit of a judgment creditor.

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But if the conclusion to which I have already come is correct, both the judgments of 5,620*l.* and 6,000*l.* were extinguished by what had occurred with reference to them in respect of the *Radley* estate. No possession, therefore, can be attributed to writs of *elegit* issued upon those extinguished judgments, and as the Sheriff returned *nil*, on the writ issuing in respect of the remaining judgment, I am of opinion, that *Alexander Donovan* cannot be considered to be in possession of the hereditaments at *Sunningwell*, as tenant by *elegit* under any of those judgments.

Up to this point I concur in the view which the Master seems to have taken of this case. But on the remaining question, as to the mode by which the accounts between *Alexander Donovan* and the estate of Sir *G. Bowyer* are to be adjusted, I have not come to the same conclusion as the Master seems to have done. The Master, in the first place, attributes all the payments of the 385*l.* per annum out of the *Radley* estate, and all the receipts of rents from *Cow Mead* and *Ferryham* and from the *Sunningwell* estate, towards the discharge  
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of the remaining judgment of 3,996*l.* But, upon the fullest consideration I am able to give to this case, I do not think that this is the just or equitable mode of considering the case. *Alexander Donovan* having, as I think I must assume, a power under his writs of *elegit* of taking possession of the *Radley* estate, then in the possession of the receiver for the benefit of the six annuitants, enters into an agreement with them, by which he forbears taking possession or attempting to do so, in consideration of receiving 5*l.* per cent. per annum, on each of the sums advanced by him, *Alexander Donovan*, to Sir *George Bowyer*. I am at a loss to understand on what principle the Plaintiff is entitled to attribute the whole of this payment, towards satisfaction of such one of the judgments as he considers it most for his benefit to apply it. Either this was a valid and legal contract or it was not. The Plaintiff does not seek to set aside the contract, on the ground that the parties to it had no power to enter into it, or that it was illegal or void, but he seeks to convert the contract (as it appears to me) into something other and different from what it was, for his own advantage, or to the prejudice of one of the contracting parties.

Assume, for the purpose of testing it, that the third judgment for 3,996*l.* had not existed, could the Plaintiff have required the Defendant *Alexander Donovan* to repay all this annual sum of 385*l.*, on the ground that the *elegits* and the judgments were extinguished, by reason of the conveyances of 1819 and 1820; and yet this would not be different from saying, that on that account, the Plaintiff is entitled to attribute towards the satisfaction of one judgment, the payment agreed to be made towards the satisfaction of the other.

Suppose the contract had been, that in consideration  
of

of interest at five per cent. being paid on each sum advanced to Sir *George Bowyer* by the Defendant *Alexander Donovan*, he had agreed to relinquish all his right and interest as tenant by *elegit*. On what principle could this Court have compelled him either to refund the money or to apply it towards satisfaction of another and a different debt? and the more so, where the Court is unable to replace *Donovan* in the situation he was in when he entered into the contract.

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The contract appears to me to have been this:—*Alexander Donovan* says to the six annuitants, in consideration of your paying to me five per cent. on 3,000*l*. (the consideration paid for the grant of the first annuity of 500*l*.), on 1,998*l*. (the consideration paid for the grant of the second annuity), and of 333*l*. on 2,760*l*. (the consideration paid for the grant of the third annuity of 460*l*.), I, *Alexander Donovan*, agree to take no step to disturb your possession of the *Radley* estate, although the Sheriff, under two writs of *elegit*, has given me legal possession of the whole. In my opinion, so much of 385*l*. per annum as represents the interest at 5*l*. per cent. on the annuity of 333*l*., and no more, is properly applicable toward keeping down the growing payments of that annuity, and that the rest of the annual sum of 385*l*. per annum may, by *Alexander Donovan*, be fairly applied towards the other annuities, although, by the contract itself, he has, in equity, and by the conveyances of 1819 and 1820 he has also at law, precluded himself from obtaining any further benefit by the execution of the writs of *elegit* sued out by him.

The result will be, that in taking the account which in my opinion must be taken, unless the parties can agree upon the amount, the sum of about 100*l*. per annum,  
 out

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out of the 385*l.*, will have to be applied towards keeping down the growing payments of the annuity of 333*l.* per annum. I am also of opinion, that the same principle is applicable to the three conveyances of 1819 and 1820. By these, property, of the estimated value of 4,891*l.* 5*s.* in the whole, was conveyed to *Alexander Donovan*, in part satisfaction of the arrears of the three annuities. In my opinion, the proportionable part of this sum, which was properly attributable to the annuity of 333*l.*, must be applied in reduction of the growing payments of that annuity.

I am also of opinion, that so far as the facts set forth on this report enable me to judge, the receipts of *Cow Mead* and *Ferryham* are not attributable towards the discharge of the annuity of 333*l.* These pieces of land were not taken possession of either by agreement or otherwise, for the purpose of satisfying the growing payments of that annuity; on the contrary, the Master finds, that *Donovan* entered into possession thereof in the year 1825, and, as I read the report, under and by virtue of the writs of execution and the Sheriff's return thereon. Whether he was entitled to do so by law (the tenancy by *elegit* being, in my opinion, at that time extinguished), or whether he might then have been, or could now be evicted from the premises, are not questions which come before me for judicial decision on these exceptions. It is sufficient for me to say, that as he is found to have taken possession of them under the writs of execution of the two judgments, the receipts must be applicable towards keeping down the growing payments of the two annuities of 500*l.* and 460*l.*, to secure which the judgments were given. I am of opinion, that the monies received by *Alexander Donovan* in respect of the *Sunningwell* property, are wholly applicable towards the discharge of the annuity of 333*l.* In my opinion,

as I have already stated, he was not in possession thereof under any *elegit* or writ of execution. He entered into possession in 1828, by an arrangement with *Rowe*, and it appears to me to be proper to attribute his subsequent possession of that property to that arrangement, and the deed of assignment of the legal interest in the term made to him by *Rowe*.

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If the lands had been extended by the Sheriff, under the writ of *elegit* issued on the judgment for 3,996*l.*, it appears to me that a question of some nicety might have arisen, as to whether, in the peculiar circumstances of this case, the Sheriff could have lawfully extended these lands in favour of *Alexander Donovan*, the trustee of the term, under the 10th section of the Statute of Frauds. But as it proposed to make him tenant by *elegit*, under the writs issued on two judgments, which were, in my opinion, satisfied, at the time of the issuing the writs, and *Alexander Donovan* being then already himself in possession of these hereditaments, as the assignee of the legal term, I am of opinion, that the whole transaction was merely inoperative, and that after the acts of the Sheriff, *Alexander Donovan* remained exactly in the same position, with respect to this property, as he was before, and as if these last-mentioned writs of *elegit* had never issued.

I have then to consider, what were the rights of Sir *G. Bowyer* against him, laying out of consideration, as in my opinion I must do, everything which relates to the annuities of 460*l.* and 500*l.*, and the two judgments of 5,620*l.* and 6,000*l.* to secure them. In that case, Sir *G. Bowyer* would, I apprehend, have been entitled, at law, to quash these writs of *elegit*, and to have made *Alexander Donovan* account for the rents and proceeds received by him, which were, in fact, re-

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ceived as his trustee and for his use. But as *Alexander Donovan* had a claim against Sir *G. Bowyer*, in respect of the growing payments of the annuity of 333*l.*, or so much thereof as is not covered by so much of the other payments as was properly applicable for that purpose, *Donovan* would be, in my opinion, entitled to set off what was due to him in respect of the annuity, against what was due from him in respect of the rents and profits of the property. And I am also of opinion that, in that case, the account would have to be taken as against him, on the same footing as if he had been a mortgagee in possession, although, in my opinion, that is not the character in which he obtained possession.

It is, in truth, in order to avoid a circuitry of action and remedies, that this Court would have allowed *Alexander Donovan* to set off what was due from Sir *G. Bowyer*, in respect of the growing payments of the annuity of 333*l.* against what was due from himself, *Alexander Donovan*, in respect of the rents of the *Sunningwell* estate.

The next question is, whether the Plaintiff and the other persons claiming as incumbrancers on this estate, can stand in any better situation than Sir *G. Bowyer* himself could have done, and I am of opinion that they cannot. If I am right in the view I take of this case, the same remedies that were open to Sir *George Bowyer* were open to them. They might, I presume, have quashed the writs of *elegit* at law; they might have obtained possession, or have got a receiver over the property, unless *Alexander Donovan's* rights, in respect of his remaining judgment, would have enabled him to retain possession. As they have taken no step for this purpose, at least so far as appears in the evidence before me, I think that I must presume that he was allowed to re-  
 tain.

tain possession with the knowledge that he was applying the rents of this property in the discharge of the growing payment of the annuity, and that they cannot now complain of his having done so, and that consequently, whether on the principle that he who sues for equity must do equity, or on the principle of his being a *quasi* incumbrancer on the *Sunningwell* estate, or entitled to a lien on the rents thereof, in respect of the judgment to secure the annuity of 333*l.*, he must be allowed to charge the growing payments of that annuity as against what is due from him for rents of the *Sunningwell* estate. The Master has refrained from taking the account, because as the account is stated by *Alexander Donovan*, and giving him credit for all the deductions he requires, the balance of his receipts amounts to much more than is sufficient to satisfy the judgment for 3,996*l.* and costs of the suit; but I dissent from this principle of taking the account. This was an annuity of 333*l.*, payable to *Alexander Donovan*, during the lives of *Ann* and *Louisa Donovan*, his daughters, and the life of the survivor; the judgment for 3,996*l.* was expressed to be a security for the growing payments of this annuity, and I am at a loss to see on what principle it can be urged, in the absence of any contract to that effect, that when the payments made to *Alexander Donovan* amount to or exceed the amount of the judgment, the annuity of 333*l.* is thereupon to cease. It is true, that upon the Master's view of this case, from which I have dissented, the total amount of net receipts, admitted by *Donovan*, would far exceed all the arrears of the annuity of 333*l.*, and on that ground it might have been unnecessary to take the account; but the principle stated in the Master's report—that the receipts far exceed the amount of the judgment and the costs of suit, does not appear to me to be applicable to this case.

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The result of all this would be, that the first exception would be allowed, that the second exception must be disallowed, and that the third and fourth exceptions would be allowed; and I should be desirous, if the forms of the Court permitted me, to direct that it should be referred back to the Master, to take the account upon the principle I have already stated. It is possible, however, that some objection to this course may be taken, on the ground that this equity is not properly an incumbrance on the estate, and that the Master, accordingly, could not, even if he had concurred with me, have so taken the account. It appears to me desirable, in order to avoid this objection, that it will be more proper to deal with this question on further directions, than to make such an order on the exceptions; but as this case has already involved so much litigation and expense, I have thought it best to state exactly how, in my view of the case, the account, as against *Alexander Donovan*, ought to be taken, and my desire to arrive at that result, if the forms of the Court and the nature of the suit will permit me so to do, instead of leaving the parties to work out their equities in another suit. In no event, however, should I propose to refer the case back to the Master.

If, indeed, it could be referred back to the same Master, who is already so conversant with this matter, I might wish to adopt that course; but as this is impossible, it will, I think, be better that one of my chief clerks should take whatever account is to be taken under my directions in chambers, than that it should be referred to such one of the Masters of the Court as may have had the remaining references of Mr. *Brougham* transferred to him.

I think that regard being had to the difficulty I have  
stated,

stated, the proper order to make on these exceptions will be, to allow the first exception, to disallow the second exception, neither to allow or disallow the third and fourth exceptions, but to reserve the consideration thereof till the cause shall be heard on further directions.

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No costs of the exceptions, and the deposit to be returned.

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NOTE.—The cause has not yet been heard on further directions, some other supplemental proceedings having been taken to perfect the record.

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ASKHAM v. BARKER.

March 4, 5.  
April 15,

BY the marriage settlement of *William Askham* and *Elizabeth*, his wife, dated in 1800, certain freeholds at *Woodside*, *Wilberfoss*, and *Thursday's Market*, were settled on them successively for life; and after the death of the survivor, to the use of all and every, or such one or more of their children as *William Askham* should appoint, and, in default, between them equally. Other property was thereby settled on them for life, successively, and after the decease of the survivor, to the donee of a power of selection cannot lawfully exercise his power, in such a manner, as to secure an advantage to himself, by any stipulation or arrangement with the appointees in whose favour the power is exercised.

The burden of proving the invalidity of an appointment lies on the person who seeks to set it aside, and not only the deed, but the whole matter, and all the accompanying facts, must be examined, in order to ascertain the real nature and character of the transaction.

A tenant for life had the power of appointing the settled property amongst such of his children as he should think fit. The trustees had, in breach of trust, lent him part of the trust monies, without taking any security. In 1834, the tenant for life appointed to his daughters the money so lent and 500*l.* in exclusion of his son. Contemporaneously, the daughters exchanged the sum so appointed for an estate of the father, and the old trustee retired. The transaction was supported, the estate being worth the amount given in exchange.

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the use of the first and other sons of the marriage in tail male.

The settlement contained a power to the trustees, to sell and re-invest the proceeds in lands, and in the mean time to invest the proceeds "in government or real securities." It also contained a power to appoint new trustees. *Oswald Allen* and *Thomas Harper* were trustees of the settlement.

On several occasions between the year 1801 and 1834, the trustees sold various portions of the property, and out of the proceeds, they, in 1802 and 1811, lent to Mr. *Askham* sums amounting in all to 4,075*l.*, upon mortgage of some property belonging to him, called *Fishergate*. Subsequently, in 1817, 1818 and 1828, they lent him further parts of the trust property, amounting to 2,100*l.* and 105*l.*, without taking any security for the same, and thereby committing a breach of trust.

In 1834, the transaction now complained of took place. At this time, his wife was dead, and he had five children then living, namely, the Plaintiff, *John Askham* and four daughters, the youngest of whom was thirty-one years of age. He possessed the *Fishergate* property, subject to the mortgage to the trustees for 4,075*l.*, and another property called *Field-house*, subject to a mortgage thereon, and he was indebted to the trustees in the sums of 2,100*l.* and 105*l.*

By deed, dated the 18th of *March*, 1834, *William Askham* appointed the two sums of 2,100*l.* and 105*l.* due from him, and also a further sum of 500*l.* part of the remaining trust monies, between his four daughters, subject to his life interest therein.

By

By indentures of the 24th and 25th of *March*, 1834, made between *William Askham* and his four daughters, *William Askham* conveyed the *Fishergate* property (subject to the charges thereon and to his life interest therein), and *Field-house*, free from the 500*l.*, but subject to his life estate, to his four daughters in fee, and they, by way of exchange, assigned Mr. *Askham* their shares in the three sums amounting together to 2,705*l.* appointed to them by the deed poll of the 18th of *March*, 1834; and by indentures of the same date (24th and 25th of *March*, 1834) two new trustees were appointed in the place of *Oswald Allen*, who wished to retire, and *Thomas Harper*, who had died.

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*William Askham* afterwards, in 1844, executed a second appointment, whereby he appointed the trust property not comprised in the previous appointment, and all others the property comprised in the settlement, to his three daughters (the fourth being then dead).

*William Askham* having died on the 11th of *June*, 1848, the Plaintiff instituted the present suit, whereby he alleged, that all the deeds of 1834 formed part of one transaction, and were a mere devise to enable *William Askham* to release himself from liabilities which he was unable to meet, and that the whole originated in the desire of the trustee to get released from the consequences of the breaches of trust committed by them in advancing the trust money to *William Askham*, and which he could neither repay nor secure. He further alleged, that there was a stipulation upon making the appointment, that the daughters would accept the property at *Fishergate* and *Field-house* as a security for the repayment of the trust monies so applied, and for which it was an insufficient security. That thereby *William Askham* not only avoided the necessity of giving security, but had obtained

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tained an advantage to the extent of 500*l.*, the residue purchase money of *Field-house*.

The bill prayed, that the deed poll of the 18th of *March*, 1834, might be declared a fraudulent exercise of the power, and that both that deed and the indentures of the 24th and 25th of *March*, 1834, might be declared void, and delivered up to be cancelled, and that the estates of *Oswald Allen* and *William Askham* might be declared liable to make good all the monies appointed and for consequential relief.

The evidence, which is fully set out in the judgment, showed, that though the whole of these matters might have formed but one transaction, and were conducted together, yet that there was no such stipulation or condition between the father and the daughters, as alleged by the Plaintiff, and that the value of the property given by the father in exchange was, at the time, sufficient to secure the amount given by the daughters.

Mr. *R. Palmer* and Mr. *Freeling*, for *John Askham*, the Plaintiff. The transaction was a fraudulent bargain and corrupt exercise of the power. Mr. *Askham*, the father, had fallen into difficulties in 1817, and, to relieve himself, he obtained advances of money from the trustees of the settlement, who thereby committed breaches of trust, as well by taking no security at all, in some cases, as in taking an insufficient security in others. Being unable to give sufficient security or to set the trust matters on a proper footing, and wishing to save the trustees from the consequence of their breaches of trust, he made the exclusive appointment of the 18th of *March*, 1834, having previously made a stipulation or condition for his doing so, that his daughters, the appointees, should assign to him the sums so appointed, in exchange for a property of less

less value. He therefore, in reality, obtained pecuniary assistance from his daughters, in consideration of his exercising the power in their favour. It is impossible, therefore, for such a transaction to stand, *Harrison v. Randall* (a); *Conolly v. M'Dermott* (b); *Jackson v. Jackson* (c); *Lane v. Page* (d); *Daubeny v. Cockburn* (e); *Arnold v. Hardwick* (f); and *Sugden, Real Property* (g). The daughters were, at the time, living with their father and under his influence, and they had no professional advice in the transaction. This is another ground for setting aside the appointment. This case was virtually decided by Lord *Langdale* on the demurrer, *Askham v. Barker* (h).

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Mr. *Roupell* and Mr. *Denison*, *contrà*. The daughters, at the time of the appointment, were perfectly competent to act for themselves, the youngest of them being above thirty years of age. They both asked and received advice; and there is no evidence whatever, that they acted under the influence of their father. The Plaintiff, who had not been very successful in his pursuits in life, took all he could get in his father's lifetime, without complaining of the appointment in question, and he now sets up a claim, which the testator, if he had known of it and had thought fit, might have effectually prevented, by setting the matter straight under a new appointment; *Farmer v. Martin* (i); 1 *Sugd. on Powers* (k). Mere suspicion of benefit to the father is not sufficient to invalidate the appointment; *Mc Queen v. Farquhar* (l); *Campbell v. Home* (m). As  
to

(a) 9 *Hare*, 397.

(b) *Beat*. 601.

(c) *Drury*, 91, 120.

(d) *Amb*. 233.

(e) 1 *Mer*. 626.

(f) 7 *Sim*. 343.

(g) *Page* 513.

(h) 12 *Beav*. 499.

(i) 2 *Sim*. 502.

(k) *Page* 371.

(l) 11 *Ves*. 467.

(m) 1 *Y. & C. (C. C.)* 664.

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to the charge of a corrupt bargain, there is no evidence except the costsbook of Mr. *Baxter*, the solicitor engaged in the transactions, which has been volunteered by him without compulsion. This, indeed, proves the transactions to have been contemporaneous, but that does not make them corrupt; nor does it show, that the daughters were acting under their father's influence, and this is denied by the daughters themselves, and by Mr. *Baxter*. It is said, that the daughters obtained some advantage, and that the exchange converts the whole transactions and fixes them with a fraud, though the mere appointment of itself would not have done so. Mr. *Baxter*, however, in his evidence, distinctly states, that he believed, at the time, that the exchange was perfectly fair and proper. If the first appointment be invalid, the second is effectual.

Mr. *W. H. Clarke*, for the children of the Plaintiff.

Mr. *R. Palmer*, in reply. The alleged laches on the part of the Plaintiff is answered by the case of the Duke of *Leeds* v. Lord *Amherst* (*a*), where waste had been committed by the tenant for life, during the infancy of the tenant in tail, who came of age ten years after, and yet the tenant in tail was held not barred by the lapse of time, though cognisant of the waste, and though he did not institute the suit till thirty years after it occurred. The same rule applies to this case. The Plaintiff could do nothing in his father's lifetime, for he could not be certain he would ever be the person to take in default, even assuming that he had a knowledge of what had been done; but he had no such knowledge. It is clear  
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(*a*) 2 Ph. 117; 14 Sim. 357.

the father was a gainer by the exercise of the power, according to the fair view of the valuations, and that is sufficient to invalidate the appointment.

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*The MASTER of the ROLLS* reserved judgment.

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*The MASTER of the ROLLS.*

*April 15.*

This is a suit instituted by the Plaintiff, for the purpose of obtaining a declaration, that a deed of the 18th *March*, 1834, was a fraudulent exercise of a power of appointment in favour of his daughters, by the father of the Plaintiff, and seeking to set aside and annul the deed professing to exercise that power, and to set aside also two other sets of deeds of the 24th and 25th of the same month, and for the relief consequent upon such declaration being made.

The ground upon which this relief is asked is, that this was the case of a stipulation made by the father for his own benefit, with some of the objects of the power, in consideration of the exercise of it in their favour, and that, consequently, this was a fraud upon the power and avoids the execution of it. It is contended on the part of the Plaintiff, I think with reason, that it is not necessary that the benefit to accrue to the donee of the power should appear on the face of the instrument, but that if the proceedings, whether contemporaneous or subsequent, which in truth are a part of the same transaction, show that the power was exercised with the view and for the purpose of conferring an advantage upon the donee of the power, such exercise of it by him is a fraud upon the power and is void in this Court. This general proposition is not contested by the Defendants,

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dants, but they contend, that the deed of the 18th *March*, 1834, was not executed by the father with any view to his own advantage, but that it was a valid and *bonâ fide* exercise of the power reserved to him. If the Court should be against the Defendants on this first point, then the Defendants contend that the defective appointment of *March*, 1834, is cured by a valid and *bonâ fide* appointment to his daughters by the father, in a deed of later date, viz., in *April*, 1844, and shortly before his decease. If the Defendants fail on both grounds of defence, they contend (which indeed is not disputed by the Plaintiff) that he must account for the sums of money paid to him or advanced for his benefit by his father, the donee of the power.

The first and most important question is the effect of the transaction which occurred in *March*, 1834. I entertain no doubt of the general principle, and that the donee or appointor cannot, lawfully, so exercise his power, as to secure an advantage to himself, by any stipulation or arrangement with the appointees in whose favour the power is exercised; and that not merely the deed executing the power, but also the whole transaction and all the accompanying facts, must be carefully examined, for the purpose of ascertaining what was the real nature and character of the proceeding; but I am also of opinion, that in this, as in all other cases imputing fraud, the burthen of the proof lies on the person who seeks to set aside the transaction. I do not, however, mean by this, that the Court requires stronger evidence to satisfy it of the truth of any fact in cases of fraud than what it requires in other cases, but that the fraud must be established by fair and reasonable inferences to be deduced from the facts proved, and that unless it be so established, the case fails and the transaction rests unimpeached.

In

In this case, the alleged fraud consists in the advantage stipulated for by the appointor, at the time he executed the power. The facts which raise this question, as established by the evidence in the cause, are as follows:—The power vested in *William Askham* (the father of the Plaintiff), the exercise of which is complained of, was created by a post-nuptial settlement, bearing date the 20th and 21st of *August*, 1800, and executed under the decree of this Court, in pursuance of articles entered into in consideration of his marriage in *July*, 1781. By this settlement, certain freehold lands and hereditaments at *Woodside*, in the parish of *Leeds*, and at *Wilberfoss*, in the county of *York*, and certain freehold messuages and houses in *Thursday Market*, in the city of *York*, were settled, so far as regarded the property at *Woodside*, to the use of the father *William Askham* for life, remainder to the use of his wife for life, and after death of the survivor, to the use of all or such one or more of the children of *William Askham* and *Elizabeth* his wife, for such estate and in such shares and proportions, and in such manner and form, with or without power of revocation, as the said *William Askham* the father, at any time or times during his life, by deed or writing under his hand and seal and attested by two or more witnesses, or by his last will and testament, should direct, limit or appoint; and in default thereof, to the use of all and every the child and children of *William Askham* and *Elizabeth* his wife, equally to be divided between them; with limitations for the substitution of their issue, in case of the death of the child; with cross remainders in case of death without issue; and if all failed, with an ultimate remainder to the use of *William Askham* the father in fee; and so far as relates to the property at *Wilberfoss* and in *Thursday Market*, it was settled on the wife *Elizabeth* for her life, and after her decease to the husband *William Askham* for his

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his life, and after the death of the survivor, for the benefit of the children of the marriage, in like manner and subject to the like power of appointment as above stated relating to the property at *Woodside*. By the same settlement, other property situate at *Kirk Hamerton* and certain closes at *Wheetwood*, both in the county of *York*, were settled on *Elizabeth* the wife of *William Askham* for life, with remainder to *William Askham* for his life, and after the decease of the survivor to the first and other sons of the marriage in tail made.

The settlement contained a power to sell the property comprised in the settlement, and to invest the same in the purchase of other freehold or copyhold lands in *England*, and in the mean time and until such investments could be found, to invest the proceeds in the purchase of government or real securities, and the settlement also contained a power to appoint new trustees. The trustees appointed by this settlement and who accepted the trusts were Mr. *Oswald Allen* and Mr. *Thomas Harper*.

Mr. *William Askham* carried on business at *Doncaster* and was possessed of a property there called *Fishergate*, which was not included in the settlement.

In the years 1801 and 1802, the trustees, at the request of *William Askham* and his wife, sold various portions of the estates which were subject to the power of appointment, and also a portion of the property settled on the eldest son of the marriage. The purchase money was thus applied :—two sums, one of 2,375*l.* and the other of 350*l.* were paid to *William Askham*, on the security of his property of *Fishergate* at *Doncaster*, and the remainder was laid out in the purchase of 9,305*l.* 17*s.* 6*d.* consols in the names of two trustees. Some

Some time in the year 1811, 2,155*l.* 13*s.* 9*d.* consols, part of this sum, was sold out by the trustees, and the produce thereof, 1,350*l.*, was paid to *William Askham* the father, on the security of a further charge to that amount on his property at *Fishergate*, the charge on which therefore, at this time, amounted in the whole to 4,075*l.*

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Subsequently to this, Mr. *Harper* died, and Mr. *Oswald Allen* became the sole trustee. In 1810, *Elizabeth Askham*, the mother of the Plaintiff, died; and in *April*, 1817, at the instance of *William Askham*, Mr. *Allen* sold out 1,350*l.*, further part of the consols standing in the names of the trustees, for the sum of 990*l.*, which he paid to *W. Askham*. In the month of *August* following, he sold out in like manner two other sums of 1,000*l.* and 250*l.*, consols, and paid the proceeds, amounting in the whole to 1,000*l.*, to *W. Askham*; and on the 6th of *October*, 1818, he sold out a further sum of 150*l.* consols, for the sum of 110*l.* cash, which he also paid to *W. Askham*. The amount of stock so sold being 2,750*l.*, and the money produced thereby, which was paid to *W. Askham*, being 2,100*l.*, for the repayment of which no security whatever was given by *W. Askham*.

In the year 1828, the remaining property in *Thursday Market* was sold by Mr. *Oswald Allen* for 105*l.*, which was paid by him to *W. Askham*, and this also without any security being given for the repayment thereof.

Nothing important occurs till 1833 and 1834. For I think it unnecessary, for the determination of the point I am now upon, to notice what had been done for the Plaintiff by his father, previously to 1834. But before considering the transaction of 1834, it is convenient to pause for a moment, to review the situation and condition

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tion of the parties concerned at this time. It is obvious that all these advances, without security, were breaches of trust, and that if *W. Askham* should have been unable to repay them, *Oswald Allen*, or his estate, would be liable to make good, not merely the sum for which no security had been taken, but also what had been secured on *Fishergate*, to the extent that that security might prove insufficient.

It is alleged in the bill, that Mr. *Askham* was, at this time, in difficulties, and that it would have been impossible for him to have repaid this sum of money; but the evidence given in the cause negatives this allegation. Mr. *Askham* was at this time carrying on, at *Doncaster*, a thriving trade as a wharfinger; he was possessed of the property called *Fishergate*, which, though charged with 4,075*l.*, part of the trust funds advanced to him, ultimately produced between 600*l.* and 700*l.* more than that amount, and he was also possessed of a house called *Field House*, the value of which is estimated, by a witness on behalf of the Plaintiff, at 1,550*l.* and which together would about equal the amount which Mr. *Askham* owed to this trust; but this house was subject to a mortgage for 500*l.*, part of the purchase-money, which remained unpaid.

The state of Mr. *Askham's* family at this time was the following:—He had five children living, the Plaintiff, his only surviving son, and four surviving daughters, viz. *Sarah Askham* and *Mary Askham*, who have since died, the Defendant Mrs. *Barker*, then *Elizabeth Askham*, and the Defendant *Ann Bella Askham*; an elder son and a daughter had both died previously to this time. The youngest of the children, at this time, was thirty-one.

The

The transactions of 1834 consisted in the execution of a deed of the 18th of *March*, and four others, which bore date respectively the 24th and the 25th of *March*, 1834. That which bore date the 18th of *March*, 1834, is a deed poll under the hand and seal of *W. Askham*, and was duly executed, according to the terms of the power contained in the marriage settlement. It recited the sale of the property, its investment in 9,305*l.* 17*s.* 6*d.* consols, and that four sums had been sold out, producing 2,100*l.*, that the residue of the stock amounted to 4,400*l.*; and it also recited the sale of the property at *Thursday Market*, for 105*l.* It then recited, that *W. Askham*, the father, was desirous of making an appointment in favour of his four daughters, of 2,700*l.*, part of the produce of the property at *Woodside*, and the deed then irrevocably appointed the sum of 2,100*l.*, being part of the trust monies arising from *Woodside*, and the 105*l.* produced by the sale of the *Thursday Market* property, and so much of the 4,400*l.* consols as would produce the sum of 500*l.*, the same being considered as part of the produce of the *Woodside* estate, subject to the life estate of their father therein, to be equally divided between them as tenants in common; and that when these three sums of 2,100*l.*, 105*l.* and 500*l.* should be laid out in the purchase of land, the property so bought should (subject to the life estate of the father) be vested in the four daughters, as tenants in common in fee. If the transaction had stopped here, no question could have arisen as to the validity, both at law and in equity, of this appointment. The father had an absolute and exclusive power to appoint in favour of any of his children; he selects his four daughters, and makes an irrevocable appointment in their favour; and although the validity of such appointment cannot depend upon the propriety of the exercise of the discretion reposed in the father, yet, in this case, as the son was tenant in

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tail in remainder of the *Wheetwood* property, or of the produce thereof, it may fairly be assumed that this was no improper exercise of such discretion. It is alleged, however, that in fact this deed was but part of one transaction, which, when fully understood, discloses a corrupt stipulation, entered into between the father and his daughters, for his own advantage, and that this appointment was, in fact, so made, as part of that arrangement, and that this appears by the subsequent deeds, and the evidence in the cause. The first set of deeds of the 24th and 25th of *March*, were indentures of lease and release, made between *W. Askham* the father of the one part, and the four daughters of the other part. The release recited the mortgage of *July*, 1801, by which 2,375*l.* of the trust money advanced to *W. Askham* had been secured on his property at *Fishergate*, and also the mortgage of *May*, 1802, by which 350*l.*, further part of the trust money advanced to *W. Askham*, had been also secured on *Fishergate*, and also the mortgage of *July*, 1811, whereby 1,350*l.*, further part of the trust money advanced to *W. Askham*, had been secured on the same premises. It also recited certain indentures, by which the father *W. Askham* had become possessed of other property in and near *Doncaster*, including therein the messuage called *Field House*, subject to a mortgage of 500*l.* thereon, and also the above-mentioned deed of appointment; and further, that *W. Askham* and his daughters had mutually agreed to exchange the reversionary sum of 2,700*l.*, so possessed by them, in lieu of the equity of redemption in the freehold and leasehold messuages and hereditaments at *Doncaster*, and subject to all the mortgages, except the mortgage of 500*l.*, which *W. Askham* had agreed to pay off. The deeds then proceeded to carry into effect this proposed exchange, and *W. Askham* accordingly conveyed and assigned the said messuages, tenements and hereditaments

ments to his daughters, as tenants in common in fee, subject to the mortgages aforesaid, and to his life estate therein, and the daughters assigned and transferred to the father the said sums of 2,100*l.*, 105*l.* and 500*l.*, then vested in them, subject to the life estate of the father therein.

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The second set of deeds, executed on the 24th and 25th of *March*, 1834, were indentures of lease and release indorsed on the indenture of settlement of *August*, 1800, whereby *Richard Marshall* and *Joseph Cawood* were appointed new trustees of that settlement, in the place of *Oswald Allen* and *Thomas Harper* deceased.

The Plaintiff alleges, that all these deeds were part of one transaction, that the transaction in truth originated in *Oswald Allen's* insisting upon being discharged from his office of trustee, and upon *William Askham's* repaying or giving security for the monies advanced to him, which he was unable to do, and without which the new trustees could not be induced to accept the office of trustees; and that in truth, this was a device and a colorable mode of enabling *William Askham* to release himself and the trustees from all further liability, by making an appointment to his daughters, on condition that they would accept as a security for the repayment of the trusts sums so appointed to them, that which, in truth, was no sufficient security; so that, by this transaction, not only did *William Askham* avoid the necessity of paying or giving ample security for 2,205*l.*, but he also obtained 500*l.*, by which he was enabled to pay the residue of the purchase money due on *Field House*.

I have, for the purpose of considering this question, carefully read the evidence both oral and documentary, and paid particular attention to the diary of Mr. *Baxter*,

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which gives a detailed account of the course which this affair took and how it was conducted : in the first place, I am of opinion, that it was all conducted together and carried into effect as one transaction ; but I am also of opinion, that if the property on which the 2,700*l.* was charged was, at the time, an ample security, the transaction cannot be impeached, on the ground that the appointment was a fraud on the power. The trustees had full power to advance the money on real security ; and if the trustees or if *Oswald Allan* had advanced this money to *William Askham* on the security of this property and it turned out sufficient, no one could have complained of the transaction. If the exchange had taken place immediately after the appointment had been made with a stranger, who had been the owner of the equity of redemption in *Fishergate* and in *Field House*, it would, in my opinion, have been perfectly good, unless there had been some other ingredient in the transaction not now appearing. As, however, it was made with the father, I am of opinion that I must examine the matter more closely, and see what advantage he obtained by the transaction. He owed 2,205*l.* to the trust ; by this transaction that sum was secured upon his freehold and leasehold property at *Doncaster*. It is true that he received 500*l.* ; and if that sum had been advanced, to be spent and applied by him, although he gave security for it, some difficulty might have arisen, at least if the case of *Arnold v. Hardwick* (a) is applicable to this case ; but in truth the 500*l.* was paid to him, for the purpose of being applied in paying off a prior charge, to that amount, on the property given as a security for the rest of the money advanced ; so that in truth *William Askham* obtained no advantage by this part of the transaction, and the security for the rest of the trust money, so far as it was on the property thus freed from the prior charge,

(a) 7 *Sim.* 343.

charge, was improved, by being made part of a first instead of being a second charge. So far, therefore, as regards the 500*l.*, and assuming the rest of the transaction to have taken place, this part of it appears to me to have been beneficial to the appointees. The proceeding, as it appears to me, can be best considered by examining the case by steps. A man has received from his trustees a fund over which he has a power of appointment; if he then secure this sum to the trustees, by mortgage on his property, and afterwards appoint it amongst some of the objects of the power, no one could object to it, on the ground that it was a fraudulent exercise of the power; although the trustees might be liable to their *cestuis que trust*, if the security on which the money was advanced was insufficient. The next step is, that where the appointment is made of the trust fund which had been previously advanced to their appointee, and he afterwards gives security for the repayment thereof; in this case also, if not made by arrangement with the appointees, the only question would be the liability of the trustees, if the security was insufficient. In the case before the Court, it goes one step further, viz., an arrangement is made, by which the appointees agree to take the security in question and thereby to exonerate the trustees. Unless it can be shown that the security was insufficient, that the appointees knew this to be the case, and that the appointment was made, on condition that the appointees should accept such insufficient security, as a means of preventing the appointor from being pressed by the trustees to replace the money, I think that the transaction cannot be impeached.

I find no direct trace of any such stipulation in the evidence. On the contrary, the evidence of Mr. *Marshall* and Mr. *Baxter* seems to me to negative any such a supposition on the part of the trustees, and Mrs.

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*Barker* (whose evidence no doubt is given under the bias of interest), distinctly swears, that there was no promise or stipulation, but that the matter was conducted, as a matter of business, by Mr. *Baxter* on behalf of herself and her sisters, and that they well knew the value of the property to be taken in exchange for the 2,700*l.* If there was no such stipulation, but the father had induced the appointees to believe the security to be good, and had imposed upon them as to the value thereof, so that, though they had agreed to make the exchange in question, they did so in the belief that their father would not have derived any benefit or advantage from this transaction, then a question of some difficulty might have arisen, to this effect:—whether the appointment would not have been good to the extent of the value of the security, and whether the dictum of Lord *Hardwicke* in *Lane v. Page* (a) could, in such a case as that which I am supposing, be considered to be overruled by the decision of Sir *Wm. Grant* in *Daubeny v. Cockburn* (b). I think it, however, unnecessary to consider that question, because, in my opinion, it must be determined, as a preliminary condition, that the security was insufficient, and because in my opinion the burthen of proving this falls on the Plaintiff, and he has failed in so doing.

The amount of the trust property mortgaged on *Fishergate* was 4,075*l.*, the amount of the sum appointed was 2,700*l.*, making together the sum of 6,775*l.* *Fishergate* has since been sold and has produced the sum of 4,734*l.*, leaving 659*l.* and the property called *Field House* applicable towards the payment of the 2,700*l.* *Field House* remains unsold, and it is always difficult to ascertain

(a) *Amb.* 234.

(b) 1 *Mer.* 626.

ascertain the value of the property in the circumstances. The Plaintiff's witnesses estimate it at 1,550*l.*, which would leave a deficiency of 491*l.* to pay the charge upon it, but *Thomas Waite*, an auctioneer and valuer, examined on behalf of the Defendants, values *Field House* at 2,700*l.* He says that the property at *Doncaster* has fallen in value materially since 1834, by reason of the railways diverting traffic from that town. He values the whole property, that is, *Fishergate* and *Field House*, in 1834 at 7,800*l.*; in 1840 at 7,275*l.*; and at present at 6,975*l.* The lowest of these sums would be more than sufficient to pay all the charges upon it. In contested cases of the value of unsold property, the Court usually finds that there is an excess of valuation on both sides, and that the surveyors or auctioneers are commonly and not unnaturally influenced by considering on whose behalf they value the property. The Court, therefore, eagerly searches for any circumstance by which to ascertain value which is independent of the opinion of surveyors, and it is remarkable, that the only fact of that nature, in this case, puts the value still higher than the witnesses on the part of the Defendants; for it appears by the evidence of the Defendants, that *William Askham* refused an offer of 4,000*l.* made to him for the purchase of *Field House* in the year 1831, which would raise the total value of the property at that time to between 8,000*l.* and 9,000*l.* The great importance however of this evidence is, that it establishes what *William Askham* believed to be the value of the property, and therefore negatives the supposition, that in 1834 he meant to give or to persuade his daughters to accept an insufficient security for the money appointed.

Upon the whole it appears to me, that the security, although not such as trustees would have been advised to advance money upon to the extent of 6,775*l.*, was nevertheless

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nevertheless a fair and reasonable security for that amount in the year 1834, and would then, if sold, have realised more than the total amount charged upon it. At all events, I am of opinion, that the Plaintiff has not (as in my opinion it was essential for the success of his case that he should do) proved that the security was insufficient. Having come to this conclusion, it is unnecessary for me to go into the other parts of the case. I give, therefore, no opinion as to whether there was or was not a valid appointment by a subsequent instrument on the assumption that the appointment of 1834 was void: or, on the double assumption that the appointment of 1834 was void and that no subsequent valid appointment has been executed, to what extent and in what way the Plaintiff, if he set aside the deeds of 1834, ought to account for the money received by him from his father by way of advancement. I am unwilling to prejudice those parts of the case by any observations of mine, in case this suit should be carried further.

In my opinion, the Plaintiff fails in the material part of his case, viz., in proving the fact which is essential to make the appointment of 18th *March*, 1834, a fraud on the power. And as he fails, in a case of this description, his bill must be dismissed with costs. I think it proper to add, that I consider my decree to be perfectly consistent with that of Lord *Langdale* on the demurrer, as the facts which come out in evidence do not substantiate the charge contained in the bill, and on which Lord *Langdale* relied, when he overruled the demurrer put in by the Defendants. Upon an attentive perusal of the bill, it appears to me that he could not have arrived at any other conclusion.

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## AINSLIE v. SIMS.

April 15.

THE Plaintiff in his bill described himself as “of *Fort William, Inverness*, in the kingdom of *Scotland*, but now residing at No. 8, *Edmund Place, Aldersgate Street*, in the city of *London*.” A motion was now made that he might give security for costs. The affidavit in support of the motion stated, that the Plaintiff usually resided and was domiciled at *Inverness*, and was then carrying on, at the same place, a very extensive business, as a merchant, and had done so for several years, either by himself, or in partnership with his brother. That one *Forbes* was the tenant of the house No. 8, *Edmund Place*, and that the Plaintiff had taken lodgings and resided there, but had not done so for any length of time, nor had he engaged them for any definite term. To this the Plaintiff made no affidavit in reply.

A Plaintiff, carrying on business and domiciled in *Scotland*, took furnished lodgings in *London*, and then filed his bill. Held, that he must give security for costs.

Mr. *R. Palmer*, and Mr. *G. L. Russell*, in support of the motion, contended, that inasmuch as the Plaintiff was resident and domiciled out of the jurisdiction, though temporarily staying in England, the Defendant was entitled to the order asked, or to a stay of proceedings; *Green v. Charnock* (a); *Seilaz v. Hanson* (b); *Hoby v. Hitchcock* (c).

Mr. *Roupell* and Mr. *Martindale*, *contrà*. The Plaintiff is domiciled in *Scotland*, but he is now residing within

(a) 3 Bro. C. C. 371; 2 Cox, 284; 1 Ves. jun. 396.

(b) 5 Ves. 261.  
(c) 5 Ves. 698.

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within the jurisdiction. [*The MASTER of the ROLLS.* The residence of the Plaintiff is ambiguous. He does not state whether he intends to remain here. His business is out of the jurisdiction, and he does not show any reasonable likelihood of his remaining here. If he merely came here on a visit, that would not be sufficient to relieve him from the obligation to find security for costs.] His person and property are both liable to the process of the Court. It is not alleged that he is about to leave, or that he has any intention of leaving *London*, or that his residence within the jurisdiction is but temporary. He has truly stated his residence, and there is no case in which security for costs has been required, where the Plaintiff's property and person are within the jurisdiction, and where he has not misrepresented his actual residence, on the face of his bill.

*The MASTER of the ROLLS.*

I can only deal with the facts of the case now before me. The question does not depend on any technical rule, but I must see if the Defendant has a fair and reasonable chance of finding the Plaintiff, to answer the process of the Court, in case he should be wanted, and I am of opinion that he has not. I by no means say, that if a foreigner were to come here and take up his abode, and hire a house for a certain period, he would be required to give security for costs. But here it is obvious from the affidavits, that the Plaintiff, whose permanent residence, business and domicile is in *Scotland*, might have come and taken lodgings within the jurisdiction for the express purpose of avoiding the necessity of giving security for costs. I think he is bound to show the contrary; for if it were otherwise, any person living on the continent might sue any person in this country, without incurring any liability. He would  
have

have nothing to do but to cross the channel, and describe himself as residing at an inn at Dover; he might leave when he pleased, and if his motions were watched, come back again.

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I concur in the argument, that the facts show a mere colourable residence, which has imposed the burthen of proving the contrary on the Plaintiff, and he has not done so. I must therefore order the Plaintiff to give security for costs.

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*Re* MOSS.

A SOLICITOR stipulated with his client for interest on his bill of costs, with annual rests, and that he should have a lien on the estate recovered.

*April 15.*  
A solicitor entered into a special agreement with his client for interest on his bill, with annual rests, and for a charge on the estate recovered. Held, that this was not a proper case for an order of course for taxation, and such an order was discharged.

The client obtained an order of course to tax the bill.

Mr. *R. Palmer*, Mr. *W. M. James* and Mr. *E. Webster* moved to discharge it, on the ground, that it ought not, under such circumstances, to have been obtained *ex parte*. *In re Winterbottom* (a) was cited.

Mr. *Prior*, *contra*.

*The MASTER of the ROLLS.*

The Taxing Master, under this order, would be bound to tax in the ordinary way. I think there is a sufficient question to make an order of course, in such a case, improper. It must, therefore, be discharged.

(a) 15 *Beav.* 80.

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## The Duke of BEAUFORT v. PATRICK.

In 1794, an act authorized the making of a public canal through lands, of which *A.* was the owner and *B.* his lessee, and, upon payment of the compensation, the land was to vest in the company. An arrangement was made in respect of compensation with *B.* but not with *A.* The canal was made, "with the full consent and approbation of and in accordance with the wishes of *A.*," whose name was mentioned in the act, and it was enjoyed until the expiration of the lease in 1844. The representatives

of *A.* then recovered at law the land taken for the canal. Held, in equity, that *A.* having thus sanctioned the formation of the canal, was not entitled to retake possession, but only to a fair compensation, to be determined by the agricultural value of the land taken, as calculated in 1844, and not in 1794. Held, secondly, that persons who had bought *A.*'s property with notice in the conditions of sale as to the canal were equally bound by the same equity. Held, thirdly, that this Court might itself determine the amount of compensation.

IN 1793, a company was formed, for the purpose of making a canal to be called "the *Swansea Canal*," which was to pass over lands of which the Duke of *Beaufort* and Mr. *Popkin* were the owners.

At that time there existed on the lands of the Duke and Mr. *Popkin* a private canal or cut in part of the line of the intended canal, which it was arranged should be deepened and widened, and then form part of the canal. This cut had been made by Messrs. *Morris & Co.*, for the purposes of their business, upon a part of the waste of the manor of *Trewyddfa*, granted to *Morris* by the then Duke of *Beaufort*, the lord of the manor, and on which *Morris* and his partners had erected copper smelting works, and partly on certain copyhold land of the same manor, which, in 1779, had been demised to *Morris* for a term of sixty-five years, but without any power to make the cut, by *Popkin*, the owner in fee.

The act passed on the 23rd of *May*, 1794 (*a*). It provided that the Duke and not the company should have power to make that part of the canal which passed through

(a) 34 *Geo. 3*, c. cix.

## DATES.

|                                   |                                |
|-----------------------------------|--------------------------------|
| 1779. Lease for sixty-five years. | 1797. Canal opened.            |
| 1783. Mortgage.                   | 1797. Arrangement with lessee. |
| 1784. Foreclosure suits.          | 1800. Sale to <i>Calland</i> . |
| 1793. Order for sale.             | 1808. Letter.                  |
| 1794. Act.                        | 1844. Lease expires.           |

through the manor of *Trewyddfa*, including the cut and several yards at each end of it, and the same powers were given to the Duke as to taking the lands, making this part of the canal, and levying the dues or tolls thereon, as were given to the company, in respect of the remaining part. The act limited the time in both cases for completing the canal to two years, and imposed a fine of 500*l.* a-year, to be paid by either party to the other, in the event of either failing to make the canal within the time, till it should be completed. By the 47th section it was enacted, that upon payment of the purchase and compensation money determined by certain commissioners, or assessed by a jury, it should be lawful for the canal company to enter upon such lands, or before such payment or tender, by leave of the owners or occupiers, and that thereupon such land should thenceforth vest in the company for the purpose of the act. The act also provided that the commissioners, appointed by the act to settle the value of lands taken and damage done and to adjust differences, should entertain no complaint for injury or damage not made within three months from the time it was done. *Popkin*, as one of the proprietors, was of course included in the special act, and he appeared also to have been a promoter of the undertaking, and was mentioned, by name, in the 1st section of the act as a proprietor, and in the 115th section, which protected his rights and interest in the fee of *Trewyddfa*, except so far as was necessary for making the canal. The canal was not opened for general traffic till 1797, and even then nothing had been done to improve or widen the cut, according to the dimensions directed by the act. On the 9th of *August*, 1797, however, an arrangement was entered into between the then Duke of *Beaufort* of the one part, and *Morris* and Co. the lessees, of the other, whereby it was agreed, that the two parties should be jointly interested in making and maintaining

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maintaining that part of the canal passing through the manor or fee of *Trewyddfa*, and in widening and improving the cut, so as to make it correspond with the rest of the canal, and an arrangement was made as to the division of the tolls to be taken by the Duke, and the compensation to *Morris & Co.* for their interest in the cut and the additional land taken; but this agreement, and the stipulations contained in it, were not authorized by the lease of 1779.

No agreement, however, appeared to have ever been made between the Duke and *Popkin*, or the reversioners entitled to the lands on the expiration of the lease, as to compensation for his or their interest; but a letter, dated 8th of *January*, 1808, written by the Duke's agent to the solicitors of the parties entitled to the reversion, requesting "information upon the subject of the consideration to be paid by the Duke of *Beaufort*, for the land taken from Mr. *Popkin's* property," showed, that there had been negotiations respecting it which terminated in nothing.

In 1783, *Popkin* had mortgaged the copyholds in question. Two suits for foreclosure being instituted, two orders were made, one in *November*, 1793, and the other in *July*, 1794, for the sale of the mortgage property; and in 1800, *John Calland* became purchaser, under particulars of sale, which stated, that the canal would run through and improve the property in question.

*John Calland* entered into possession and the lessees paid their rent to him, and after his death, in 1803, to the devisees until the expiration of their lease in 1844. Shortly afterwards the Defendants, his devisees in trust, brought an action of ejectment against the Duke of *Beaufort*, to recover so much of the land and banks of the *Swansea Canal* as formed part of the land demised by  
 by

by *Popkin*. On the trial, a special verdict was found, stating, among other things, that no payment or satisfaction had been made or agreed to be made to the owners or proprietors of the lands taken for the purposes of the canal, but that everything done by the Duke had been done with their full consent and approbation, and that the maps and books of reference deposited with the clerk of the peace showed that the canal was to pass through the lands in question, of which however there was no conveyance.

The case was afterwards argued in the Court of Exchequer, and the judgment was in favour of the Plaintiffs in the action (a).

In 1851, the present suit was instituted by the Duke of *Beaufort*, against the devisees of *Calland*, the Duke's eldest son and tenant in tail of the estates, and the Attorney-General, to restrain the devisees of *Calland* from proceeding further in the action of ejectment, from commencing any other proceedings at law for recovering possession of the premises, and for a conveyance from the devisees to the Plaintiff, he offering to pay them what, if any, compensation which might be due under the provisions of the *Swansea* Canal Act.

The *Solicitor-General*, Mr. *W. M. James* and Mr. *Cracknall*, for the Plaintiff. The jurisdiction of this Court to protect the Plaintiff from the enforcement of the legal title against him is based upon the equity raised by these facts and circumstances:—The lands sought to be recovered were included in the maps and books of reference, deposited with the clerk of the peace, and were part of the lands authorized by the act to be taken for the purpose of the canal. The Duke of *Beaufort* accordingly entered upon the lands, for the purpose

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(a) See 6 *Esch. Rep.* 498.

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purpose of making the canal, not only with the consent and approbation, but at the earnest wish and request of all the proprietors in its line of direction, including Mr. *Popkin*. He, it appeared, was aware of and took an active part in all the proceedings; he was a promoter of the scheme; he stipulated, by a clause in the act, for his own rights and interest, and he was greatly benefited by the passage of the canal through his estate; so much so, that when it was put up for sale, the canal was particularly mentioned as greatly improving it. The Duke, therefore, having entered and completed the undertaking, with the knowledge of Mr. *Popkin*, and the parties interested, who stood by and approved of what he did, and having omitted to enter into a formal contract, as directed by the act, must be considered as acting under an implied or presumed contract with Mr. *Popkin* and those parties. This Court will enforce the specific performance of that implied contract, and will direct a conveyance of the lands, upon payment of a proper compensation, supposing the presumption of payment of compensation rebutted by the special verdict.

Such an agreement might have been made between the Duke and Mr. *Popkin* (who was under no disability) without the aid of the provisions of the act; and even if made without pecuniary compensation, it would not have been without consideration, for the acknowledged fact of the undertaking greatly contributing to the value of the rest of *Popkin's* land would, in itself, have formed a sufficient consideration. But however that may be, Mr. *Popkin* having allowed the Duke to enter upon the lands and complete the work without obstruction, he and the parties who claim under him are bound to a transfer of the legal estate. Similar cases have come before the Court. In *Duke of Devonshire v. Eglin* (a),  
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(a) 14 *Beav.* 530.

the Plaintiff, the Defendant consenting, upon being paid a reasonable compensation, made a watercourse over his land, but no grant was executed or sum arranged, and after nine years' user, the Defendant was restrained from stopping it up, and a reference was directed to the Master to settle a proper compensation. That case is exactly similar to this, for practically, this is but an easement, and it is found by the special verdict, that *Popkin* knew and consented. In *Jackson v. Cator*(a), a landlord was restrained from cutting ornamental trees on a lawn, during the tenancy, on the ground that his conduct implied a consent to the tenant's plan of improvement. It is clear, therefore, that Mr. *Popkin* must be taken to have dedicated the land to the undertaking, and to the use of the public; and it would be preposterous, that a public benefit to a whole district should be destroyed by this stale demand on the part of the Defendants. They must convey the land on receiving a reasonable compensation. The Defendants, indeed, say, that on payment of tolls to them they will not deprive the public of the use of the canal; but by the act, the tolls are made payable to the Duke and to the Duke only, and if he be not permitted to levy them, nobody else can. No doubt, the lands were not duly taken under the provisions of the act of Parliament; but if the owners or proprietors were to stop the canal, the proceedings in the case of *Dimes v. Grand Junction Canal Company*(b) would be repeated, and, like *Dimes*, the devisees would be held to be trustees, and would be restrained from interfering with the canal, upon receiving suitable compensation. As to the non-payment of compensation, the probability is, that it was overlooked or disregarded at the time the undertaking was in progress; for it was then too trifling, and could not have exceeded a few shillings.

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(a) 5 *Ves.* 688. (b) 9 *Q. B. Rep.* 469, 518; 15 *Sim.* 402; 12 *Beav.* 63.

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As to the letter of 1808, it merely shows, that *Popkin*, or those claiming under him, had not abandoned all notion of compensation. Nor can it be urged, as an excuse for not claiming compensation at the time, that it could not then be enforced; for the act provides ample machinery for enforcing compensation, and there is no limit to the time, nor any impediment to obtaining satisfaction. They cited *Doe d. Patrick v. The Duke of Beaufort* (a); *Powell v. Thomas* (b); *Prendergast v. Turton* (c); *Toulmin v. Steere* (d); *Daniels v. Davison* (e); *The Proprietors of the Stourbridge Canal v. Wheeley* (f); *The King v. The Commissioners of the Navigation of the Rivers Thames and Isis* (g); *The Master, &c. of Clare Hall v. Harding* (h).

Mr. *Campbell*, for the Marquis of *Worcester* (eldest son of the Duke of *Beaufort*), and first tenant in tail of the property, in the same interest with the Plaintiff, contended, that the claim for compensation would not go with the land, and that if any such ever existed, it passed to the representatives of Mr. *Popkin*, who were now barred by the lapse of time.

Mr. *Wickens*, for the Attorney-General. It requires much less to constitute a dedication of property to the use of the public, than it does to establish a right in private individuals; and the Duke, though he has his individual rights, is also a trustee for the public; and that which he has done, as such trustee for the public is binding upon the party with whose knowledge and consent it has been done. The circumstances of this case are sufficient to show that there has been a  
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(a) 6 *Exch. Rep.* 498.  
 (b) 6 *Hare*, 300.  
 (c) 1 *Y. & C. C. C.* 98.  
 (d) 3 *Mer.* 210.

(e) 16 *Ves.* 249.  
 (f) 2 *B. & Ad.* 792.  
 (g) 5 *Ad. & El.* 804.  
 (h) 6 *Hare*, 273.

dedication of this property to the public use, which cannot now be questioned.

Mr. *R. Palmer* and Mr. *Pemberton*, for the Defendants, the devisees of *Calland*. The Duke is or stands in the place of the lessee merely; he is not in under the provisions of the act. A lessee, who knowing the extent of his title, expends money in making improvements on the estate, in which he has no permanent interest, has no claim to relief, notwithstanding the knowledge of the parties interested, that such expenditure was being made, unless a case of bad faith is clearly made out; *Dann v. Spurrier* (a); *Pilling v. Armitage* (b). There has been no dedication to the public of this portion of the canal, for this is the ordinary case of a lessee improving property, or applying it to a particular purpose, during his tenancy; the user of the canal by the public, during the term, gives them no right as against the remainderman; *Wood v. Veal* (c). All appeals to feeling and allegations of public inconvenience are of no avail in such a case, the Attorney-General has no rights whatever, for this is not his suit, and the reversioner's estate cannot be taken away from him, except by force of the provisions contained in the act of Parliament. Now the canal was not made within the time limited by the act, nor indeed was anything done within the time. The cut remained *in statu quo*, while the new parts of the canal were being made. The Duke neither widened nor deepened it within the time allowed by the act; but after that time had expired, he entered into an agreement with the lessees, that the existing cut or canal should, as between him and them, be adopted as the canal he was to make, and under that

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(a) 7 Ves. 231. (b) 12 Ves. 78. (c) 5 Barn. & Ald. 454.

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that agreement the canal has been enlarged and widened, and since used by the Duke. The act of Parliament, therefore, is wholly out of the question, and the rights of the parties now litigant are just what they would have been, if it had never been passed.

But even supposing Mr. *Popkin* to be bound, still the Defendants did not derive their title from him, but obtained the reversion from the mortgagees, by the surrender of the 4th of *August*, 1783. Mr. *Popkin* had nothing but the equity of redemption in the property; the mortgagees had the legal estate. The sale to *Calland* was made by the Court, under a decree of foreclosure, and the legal estate was transferred from the mortgagees to the purchaser. Mr. *Popkin* did not, at any time, represent himself as being, nor was he, in fact, at any time in a condition to treat with the Duke for the property; and though he was a party to the act, and is mentioned in it, that would not, in any way, affect the title of the mortgagees and those claiming under them. The time allowed by the 14th section of the act, for completion of the canal, expired on the 1st of *July*, 1796, and nothing was done to the cut at the time of the opening of the canal for public traffic. On the 8th of *January*, 1808, the letter by the Duke's agent was written respecting the compensation, as to which nothing had been done, and after the expiration of the term in 1844, the reversioners successfully asserted their right at law. It is said, that all that was done was so done with the consent of the owners of the property, that is, as it is insinuated, of every one who had any interest whatever; but that is not so, and the Duke was bound to purchase the interest of all those who were within the operation of the act, by means of the compulsory powers thereby given, and to do so within the time thereby limited. They cited The *Rochdale* Canal Company

pany v. *King* (a); *Protheroe v. Forman* (b); *Harrison v. Nettleship* (c); *Chuck v. Cremer* (d); *The Durham and Sunderland Railway Company v. Wawn* (e).

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The *Solicitor-General*, in reply. It is said nothing was done under the act of Parliament, and reference is made to the 14th section, whereby two years were allowed for completion of the canal; and it is contended, that the Duke could not go on to exercise the compulsory powers of the act after the two years. But this is a mistake as to the construction of this section in question. If the making of the canal was to stop at the end of two years, what is the use of the penal clause, directing a payment by the Duke of 500*l.* for every year's delay beyond that time. The fixing of a penalty shows that the work was to be continued even after the two years. Besides, the canal was opened to the public in 1797, and from the agreement, dated in *August* of that year, between the Duke and the lessees, it will appear, that the work to be done had been then done, for it recites that it was, previously to the act, stipulated, that the cutting should form part of the canal; and though this and the other parts of the deed are not conclusive on the point, still it must be taken that the work was done, as to which there was no complaint at the time. But the Duke having power, by the act, to go over the land and make surveys, and the undertaking not being left to his own will and pleasure; if the parties interested stand by and see the land of others, as well as their own, applied to a common purpose, they cannot afterwards prevent the scheme or withdraw their land from the operation of the act. The public

(a) 2 *Sim. N. S.* 78.

(b) 2 *Swanst.* 227.

(c) 2 *Myl. & K.* 423.

(d) 2 *Ph.* 113, 477.

(e) 3 *Beav.* 119.

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public, being interested, can compel them to continue the appropriation. From the moment notice to take land is served by the company on the proprietors, they are bound and must part with it accordingly; and from the moment the Duke entered, it being perfectly competent to him to enter, the lands became his. The Duke entered with the leave and licence of *Popkin*, and having so entered, the only question remaining was as to the amount of compensation to be afterwards allowed.

April 16. *The MASTER of the ROLLS.*

This is a suit instituted for the purpose of restraining the first four Defendants on the record from obtaining possession of a certain piece of land, about 1,372 yards long, and about nine yards wide, containing about three acres, being a portion of what is called the *Swansea Canal*. The land itself is of copyhold tenure, held of the manor or fee of *Trewyddfa*, of which the Dukes of *Beaufort* have been the lords during the whole time in question in this case.

In the year 1779, a lease of this land, for a term of sixty-five years, from *Michaelmas*, 1779, was granted by a gentleman of the name of *Popkin*, who was the owner of the copyhold in fee simple. The lessees had also obtained a grant of a part of the waste of *Trewyddfa*, from the Duke, and had erected thereon certain works, and they, for the purpose of conveying minerals, made a cut or private canal through the land they held. It was altogether 2,420 yards long, of which 1,372, the portion in question, was made on the lands demised, and the residue, 1,048, was made through the Duke's waste. Although no power for the purpose is contained in the lease of 1779, I think it reasonable to infer, that such cut or canal was made with the leave and licence
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of the lessor, Mr. *Popkin*, and that he, consequently, could not have complained thereof pending the lease.

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In 1793, a company was formed, for the purpose of making, under the authority of parliament, a canal, to be called "The *Swansea Canal*," of which the private cut so made on the fee of *Trewyddfa*, was to form a part, but to be improved and widened, so as to make it correspond, in dimensions, with the rest of the proposed canal. In *May*, 1794, the act authorizing the canal passed. It provided that, through the fee of *Trewyddfa*, belonging to the Duke, the canal company should have no power of making the canal, but that the Duke should be empowered and required, at his own costs and charges, to make and maintain the canal through that manor, between certain specified limits; and the same powers were given to the Duke, for this purpose, as were, for the other parts of the canal, given to the canal company.

The canal was opened for general traffic in 1797, but the portion through the fee of *Trewyddfa* was not improved and widened, according to the dimensions directed by the act, till subsequently to the month of *August*, 1797, when an agreement was entered into between the Duke and lessees for that purpose. No arrangement was then or subsequently come to with any person entitled to the reversion of the land demised by *Popkin*, by which the value of that reversion in the lands was ascertained or paid for.

The lease for sixty-five years expired on the 29th *September*, 1844, and shortly afterwards, the four first Defendants on the record brought their action of ejectment, to recover the three acres above described, being part of the land demised by *Popkin*. On the trial, a
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special verdict was found, stating all the material facts, upon argument of which, before the Court of Exchequer, it was held, that the four Defendants in equity were entitled to recover the land in question, and thereupon the present bill was filed, to stay execution in the action of ejectment, to restrain the institution of any other proceedings at law, and to compel the Defendants to execute proper conveyances to the Plaintiff, on the payment of what, if anything, is due to them for compensation, under the provisions of the *Swansea Canal Act*, or at least for an injunction to restrain the Defendants from interfering with or obstructing the use of the canal.

It is necessarily admitted, on both sides, that at law the Defendants are entitled to the possession of the land covered by the 1,372 yards of the canal. The question argued before me is, whether the facts of this case do not raise an equity, which this Court will enforce, by preventing the Defendants from exercising their legal right; and if so, whether the Court will, in so restraining the Defendants, impose upon the Plaintiff any, and if any, what conditions. In other words, I am of opinion, that the question I have to determine is, whether there has been such an appropriation of this land to the public, as binds the Defendants in equity from disputing it; and if this be established, whether the Defendants are entitled to any compensation, and, if any, on what principle.

The Plaintiff contends, that inasmuch as the lands sought to be recovered were included in the maps and books of reference deposited with the clerk of the peace, and were parts of the land authorized by the act to be taken, and as every thing that was done by the Duke is found to have been done with the full consent and approbation

approbation and in accordance with the wishes of the owners and proprietors, which class includes *Popkin* (the owner of the reversion of the lands in question), he must be taken to have dedicated this land to the public, for the purpose of this undertaking, and that this will bind the Defendants, who claim under him. It is contended also, on the part of the Plaintiff, that in no view of this case are the Defendants entitled to recover possession of the land, for that even if it be held that *Popkin* did not dedicate the land to the undertaking, still that the only claim which the Defendants can enforce is, to be paid a fair and reasonable compensation. All presumption of compensation, arising from length of time, is excluded by the fact found by the special verdict, that no payment or other satisfaction was made, or agreed to be made, to the owners or proprietors of the lands in question.

The Defendants contend, first, that there has been no appropriation to the public at all of this portion of the canal.

Secondly, That nothing which has taken place has been done in such a manner as to affect *Popkin*.

Thirdly, That even if *Popkin* be bound, the Defendants do not claim under, and are in no respect affected by, the acts of *Popkin*.

On the first point, it is urged, that the canal through the fee of *Trewyddfa* was not made, in fact, under the authority of the act, for that the statute, by the 14th section, required that the canal should be made within two years from the passing of the act, and limited the time for making it to that period. That, consequently, the compulsory powers of the act ceased, on the expiration

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tion of that time, and the rest of its provisions have no bearing on the question at issue; and that, as the canal was made, so it can only be maintained, if at all, by arrangement between the Duke and the proprietors of the lands. I am, however, of opinion, that this is not the true construction of the 14th section of the act, but that the final clause of that section controls the time limited by the previous part of the section: it is in these words:—"And if either of the parties so named shall neglect or refuse to make and complete the canal within the time so limited as aforesaid, then and in such case the said parties so neglecting or refusing shall pay to the other the sum of 500*l.* annually, until the same shall be made and completed, and so in proportion for any less time than a year."

It could not have been the intention of the legislature to impose payment of a perpetual annuity of 500*l.*, in case the canal was not completed in two years, which would be the result of holding, that when two years had expired it could not afterwards be made under that act. In my opinion, the real meaning is, that the time is unlimited, but with this proviso:—that if it be not completed within two years, a sum shall be paid, by way of penalty, for the excess beyond that period, at the rate of 500*l.* per annum.

On the second head, viz., whether *Popkin* is bound by what took place, it is contended by the Plaintiffs, that *Popkin* is bound, on the principle laid down in *Dann v. Spurrier* (a), and other like cases, which I have referred to lately on various occasions, and particularly in the *Rochdale Canal Company v. King* (b), viz., that he
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(a) 7 *Ves.* 231.

(b) 16 *Beav.* 630.

who stands by and encourages an act, cannot afterwards complain of it, or interfere with the enjoyment of that which he has permitted to be done. This, as a general proposition, is not disputed on the part of the Defendants, but they draw the distinction to be found in *The Master, &c. of Clure Hall v. Harding* (a), in *Pilling v. Armitage* (b), and other cases, where it is held, that the encouragement given to a lessee will not affect the reversion, or give the lessee, or any one claiming under him, any additional rights, because he knew what his title was, and what his length of tenure in the land was; the permission, therefore, given by the landlord to the lessee cannot bind or affect his reversion. I concur in this principle, but I am of opinion that it is not strictly applicable to this case.

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A cut, or private canal, had been made by the lessees, with the sanction of *Popkin*. This could not bind his reversion, and at the end of the term he might recover it; but this canal was not of the dimensions required by the act, although it was, when improved and widened, to form a portion of it. *Popkin* had full knowledge of the *Swansea* Canal Act, and of every thing relating to it. His name is mentioned as a proprietor in the 1st section; his name is also mentioned in the 115th section, which provides, that his right and interest in the fee of *Trewyddfa* shall not be altered or lessened, except so far as is necessary for making and using that part of the canal which is to pass through and over that fee. This extension and improvement of the canal through *Trewyddfa* also took place, by an arrangement between the Duke and the lessees, for the purpose of making it correspond with the rest of the canal, and an arrangement

(a) 6 *Hare*, 273.

(b) 12 *Ves.* 78.

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arrangement was made between them, as to the division of the tolls to be taken by the Duke under an agreement of the 9th of *August*, 1797, which was not, nor were the stipulations therein contained, in accordance with, or authorized by, the lease of *September*, 1779. Now it is expressly found, by the special verdict, that every thing that was done by the Duke was with the full consent and approbation of, and in accordance with, the wishes of the owners and proprietors, of whom *Popkin* was one. It would, therefore, be contrary to the principle of equity to which I have referred, if I were to confine this sanction and consent to the arrangement between *Popkin* and his tenant, by which the original cut was made, and to permit *Popkin*, the owner of this property, who had sanctioned the improvement and widening of the canal through his land, so as to make it correspond with the dimensions required by the act, and who had known and approved of the division of tolls, which could only be levied by the authority of that act, to assert, that he meant this permission to be temporary only, until the lease to one set of the parties to the agreement had concluded, and, although the act pointed to permanence, to allow him to insist on a right to destroy that canal, and put an end to the very thing he had approved.

I am of opinion, therefore, that so far as *Popkin* is concerned, and so far as regards any persons claiming through him, he and they must be held bound to this extent, that he is not entitled to obtain possession of the land covered by the canal, or to interrupt or interfere with the use thereof.

The next question is, whether the Defendants are bound by the acts of *Popkin*, and if not, whether they are affected by any separate and independent circumstances

stances, which make it inequitable that they should be allowed to exercise their legal rights, and obtain possession of the land covered with the canal.

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For the purpose of determining this question, it is necessary to refer to the circumstances attending the title of the Defendants. The estate of which *John Bennet Popkin* was seised, was called the *Forest* estate. It included certain freehold hereditaments, and also the copyholds in question, which were part of the fee of *Trewyddfa*.

In the year 1771, Sir *Watkin Lewis* and his wife filed a bill in Chancery, apparently for partition, against *John Bennet Popkin* and *Paul Methuen*; and by a decree made in *April*, 1774, part of the freehold portion of this *Forest* estate was allotted to Sir *Watkin Lewis* and his wife, and the costs of all parties thrown on the residue of that estate. In *August*, 1783, *John Bennet Popkin* mortgaged these copyholds in the fee of *Trewyddfa* to one *Albany Wallis*, and made a surrender of them for this purpose. In 1784, *Paul Methuen* filed a bill against *John Bennet Popkin* and *Albany Wallis*, to foreclose a mortgage made to him of this *Forest* estate, and *Albany Wallis* also filed his bill, for the purpose of foreclosing the copyhold hereditaments included in his mortgage. Two orders were made in the cause of *Lewis v. Popkin*; one of *November*, 1793, before the act for making the *Swansea* Canal had passed, and the other in *July*, 1794, shortly after the passing of that act, by which all the *Forest* estate, both freehold and copyhold, was ordered to be sold by the Court, which was accordingly done. Under the first sale, the Defendant *Popkin* was the purchaser, the biddings were opened, and the Duke of *Beaufort* was declared the purchaser; but the biddings were opened once more,  
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on the application of Sir *Robert Goring*, and finally *John Calland* was declared to be the purchaser of the estate, on the 21st *June*, 1800; he paid his purchase money and was let into possession of the estate, accordingly, some time in that year. The particulars of sale under which *John Calland* bought had been prepared after the act for making the canal had passed, but before it had been made, and they contained a statement that the canal would be made through the estate, in pursuance of that act, and which, it was stated, would render the estate very valuable. The rent of 145*l.* was duly paid by the lessees of the copyholds, from 1800, to *John Calland*, the purchaser, until his death, which took place in 1803, and, from that time, to the devisees in trust under his will; and the four Defendants represent these devisees. The purchase was not finally completed till the year 1827, when an order was made for that purpose, in all the three causes. *Popkin* died in 1804.

In this state of circumstances, I am of opinion, that the purchasers are not bound by the acts of *Popkin*, except so far as it appears by the facts above detailed, that their testator had a knowledge of those acts. But the Defendants are clearly bound by every thing that bound their testator, *John Calland*; and I think that, upon these facts, *John Calland* could not, after his purchase, have contended with success, that he was entitled to resume the land occupied by the canal, after the expiration of the term of sixty-five years. He bought under particulars of sale, which expressly stated the intention to make it; he bought at a time when it had actually been completed, and when, therefore, he knew, or, according to the rules of this Court, must be taken to have known, that the canal was in existence. I am of opinion that he bought with the knowledge,
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and subject to the implied condition, that the canal was to remain, and was to be used for the benefit of the public, for ever thereafter; and that neither he, nor his devisees, nor those who represent them, can prevent the enjoyment of this easement in future.

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It is proper to notice, in this place, an observation of the Counsel for the Defendants, to the effect, that the Defendants have no desire to interfere with the traffic on the canal, or the public use of it, provided the persons using it will pay to them a reasonable sum for the use thereof. But it appears by the act, that the Defendants could not legally levy any tolls; that the right to do so is vested in the Duke alone, and therefore the Defendants, who could at law stop the canal, would have that means, and that only, by which they might, and unless restrained by this Court, probably would extort from the public such payment as they might think fit to exact, and which would be measured only by what the public might be content to pay, rather than have their traffic impeded or destroyed, by which means the very scope and object of the act would be defeated, and the benefit to the public annihilated.

On the subject of compensation, I have had more difficulty. The finding in the special verdict, and the letter of the Duke of *Beaufort's* agent, in *January*, 1808, preclude the presumption (which might otherwise have arisen) of a conveyance of the reversion, and that *John Calland* bought in the belief and subject to the assumption, that such had been the case. And not merely does the special verdict negative any agreement for payment of compensation to the owner of the reversion in these lands, and not only does the letter of *January*, 1808, show that the question of compensation was then under discussion and agitation, between the devisees of *Cal-*
land

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land and the Duke; but the surrender of the property, made under the order of 1822, includes the whole of the land mentioned in the particulars of sale, published before the canal was made, and includes the whole surrender by *John Bennet Popkin* to *Albany Wallis*, in 1783, and including, therefore, the land occupied by the canal. Although, therefore, I am of opinion that the Defendants cannot be allowed to obtain possession of that portion of the canal, and to interrupt the traffic upon it, yet they must be entitled, in my opinion, to receive some fair and reasonable compensation for their interest in the land, which this Court, in the circumstances of the case, will not allow them to take possession of.

The next question is, on what principle is that compensation to be ascertained. It cannot, I think, be ascertained under the powers of the act, for the 44th section enacts, that the commissioners shall neither be obliged nor allowed to take notice of complaints of persons injured, unless made within three calendar months next after the damage shall have been sustained; and although some question might arise on the concluding words of that section, I think that it would not now be possible to call out the powers of the commissioners. I must therefore myself determine, on what principle the compensation is to be assessed, that is, whether the Plaintiff ought to pay what the value of the reversion was in 1797, when possession of this land was taken under the statute, or whether the present value of the land should be ascertained. I think that the compensation cannot be on the principle of what the value of the reversion was in 1797. The Duke, under whom the Plaintiff claims, might then have ascertained that value, under the powers of the act, and have paid or tendered it to the persons entitled. He cannot, in my opinion, properly

properly obtain any advantage, by having abstained from so doing; he has, in fact, taken and paid for (either in money or by the agreement of 1797) the residue of the lease of 1779, so far as it comprised land covered by the canal; but he has not paid for the reversion subject to that lease, and he has waited for this purpose till the lease has expired. Until that period had arisen, there was no mode by which the purchasers of the reversion could have enforced payment; if they proceeded under the 44th section, they were bound to complain within three months after the canal was completed; they could not have proceeded by injunction, because they had sanctioned the making of the canal, and after it was completed, the user of it would not have been waste. It is true that they might, within three months after the completion of the canal, have applied to the commissioners to assess compensation, and so also might the Duke. Possibly, as was suggested at the Bar, the smallness of the sum prevented them, mutually, from having recourse to this process; but the same principle must regulate the decision of the Court, whether the value of the reversion be large or small. During the whole of the time that has elapsed, the money which ought to have been applied in paying the owner of the reversion, has been in the pocket of the Duke and of those who claim under him, and during the whole of that time also, the reversion in the property has been gradually increasing in value. It is true that, in my opinion, the Plaintiff cannot be charged on the principle of compound interest, but he has waited till the property he requires for the use of the canal has ceased to be reversionary, and is therefore increased in value.

It appears to me that the present case is analogous to what occurs under one of the modern railway acts. The company have power to take additional land at a

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future time, for a station or some other purpose. They do not feel at first the want of it, and they delay taking it for several years. In the mean time, the value of the land has risen. The company must, in my opinion, pay for such increased value, although if they had taken the land, when they had first the power of doing so, they would have paid less possibly than one-half of the increased value. The circumstance that the railway company had bought up the interest of a lessee in the property, and had allowed the lease to expire before coming to any arrangement with the lessor, would not alter their rights, or enable the company to say to the reversioner, "you shall receive now only the price for which the reversion might have been bought when the company took the lease." I am of opinion, therefore, that the Plaintiff must pay for the value of the land at the time when the reversion fell in.

At the same time, I am of opinion that the Defendants are entitled only to be paid the fair and reasonable value of the land, as if the same were not wanted for the purposes of the canal, and not a fanciful amount based upon calculations of possible advantages not in existence, or upon any supposed diminution of advantage to the right of their property, under what is usually called severance. I am of opinion that I ought to fix this amount myself, and not send it to any other tribunal to ascertain. I propose, therefore, to require the Plaintiffs and Defendants to lay before me evidence of the value in *September*, 1844, when the lease expired, of the land occupied by this portion of the canal. I am of opinion that it ought to be estimated as if it were a piece of land of that size and shape, lying perfectly detached from the rest of the Defendant's land, having no unusual advantages of position, and of the agricultural value of the land adjoining the canal. When this
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is done, either by agreement between the parties or by my decision on the evidence laid before me, I will make a decree, ordering, that upon payment of the sum so ascertained, (to be stated in the decree,) and interest upon it, at 4l. per cent. per annum, from *September*, 1844, the Defendants are to execute all proper conveyances of the land so taken, to be settled by me in chambers, in case the parties differ, and also continue the injunction already granted in this cause.

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RICHARDS v. The SCARBOROUGH Market
Company.

MESSRS. A., the Plaintiff's solicitors, had entered into a contract with Mr. N., to employ him as their town agent, for a term of fifteen years. Being dissatisfied with his mode of conduct of the present suit, they obtained an order of course to appoint Mr. F. in his place, as solicitor on the record. Upon the application for the order, they made no mention of the existence of the contract, which had not then expired. Mr. N. now moved to discharge the order for irregularity, on the ground of the suppression of a material fact.

March 8, 12.

A country solicitor agreed to employ a town agent for fifteen years. Before the expiration of the term, he obtained an order of course, in a suit, to change the agent, suppressing the existence of the special contract. The order was discharged for irregularity, with costs.

Mr. James and Mr. Roxburgh, for the motion, contended, that, upon an application for an order, "by motion or petition as of course," under the 18th General Order of the 26th of *October*, 1842 (a), any special circumstances

(a) Ord. Can. 214.

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circumstances which existed ought to be stated, and that there was no reason why an order of course to change a solicitor should not, like any other order of course, be discharged on the ground of the suppression of material facts; *De Feuchères v. Dawes* (a).

Mr. *R. Palmer* and Mr. *C. C. Barber*, *contrà*. There is no instance of a special order having been made to change the solicitor on the record, and the question is, whether, under any circumstances whatever, the right of a client to change the acting solicitor can be affected by a private arrangement between the solicitor and his town agent. Formerly, the solicitor might be changed without an order, by an application to the clerk in Court, and since the abolition of that office, the solicitor or agent may be changed, by an order, either by motion or petition as of course, under the 18th General Order of the 26th *October*, 1842; but until such an order has been obtained, the former solicitor is to be considered the solicitor of the party. If a special application had been made in this case, no other than the common order to change the solicitor would have been made, and it could not have been resisted. If the delivering up of the papers, and anything consequent upon the order had been required, a special application to the Court might have been necessary, but nothing more than a change of the solicitor on the record was required, and this would not affect any question between the principal and the agent. This Court would not regard any such a contract, so as in any way to affect the Plaintiff's rights. It may be said that the application is not in the name of the Plaintiff, but in that of the solicitor, and that is true; but such is the practice which has gradually grown up.

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(a) 11 *Beav.* 46.

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The questions are, first, whether, upon an application for an order to change a solicitor on the record, anything special can arise; and if so, secondly, whether there was any circumstance in this case which ought to have been communicated to the officer. It is alleged, that, as such an order is absolute and unconditional, nothing special can arise upon it. I do not concur in that view of the case. There are many cases in which the circumstances might be such as to disentitle a party to an order of course to change his solicitor. Suppose an executor were directed by his testator to continue to employ a particular solicitor in a suit, it would not be a matter of course to obtain an order to discharge him. The fact, at all events, ought to be mentioned specially.

I do not see why the observations of Lord *Langdale* in *De Feuchères v. Dawes*(a) should not be applicable to every case of an order of course, and why, if any material fact is suppressed or not mentioned, the party applying for the order of course should not, in all cases, be disentitled to retain it. The question is, whether such a state of things exists here? There may be a contract, which disentitles the solicitor to discharge his agent, but no contract between the solicitor and his agent can prevent the client from the exercise of his undoubted right to discharge his solicitor. This, however, is not that case. This application does not emanate from the client, but from the solicitor himself, between whom and his town agent a contract had been entered into, as to the effect of which I give no opinion,
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but which, if mentioned, the officer might have said
“ a special application is necessary.”

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I have considered this case, and I am of opinion, that the fact of the existence of a special contract between the solicitor and his town agent ought to have been stated to the officer, when the order to change the solicitor was applied for. In the absence of any expression of a desire, on the part of the client, to change the town agent, and without expressing any opinion as to his right to do so, or whether he would be bound by such an agreement as is stated to exist in this case, I must discharge the order as irregular, with costs.

BONNER v. BONNER.

April 18.

A married woman was entitled to 60*l.* in Court, but, on her marriage, she was indebted to the extent of 100*l.* which had been proved under the husband's bankruptcy. Held, that the assignees were entitled to the whole fund.

A MARRIED woman was entitled to a sum of about 60*l.* in Court; her husband had become bankrupt. She was in debt at the time of her marriage, and debts to the amount of 100*l.* had been proved under the husband's bankruptcy.

Mr. *Dickinson* submitted, under these circumstances, that the whole fund ought to be paid to the assignees.

Mr. *Giffard, contra*. If the wife survived the husband, she would be still liable for these debts, and yet she would be deprived of the fund to pay them.

The MASTER of the ROLLS. I think the assignees are entitled to the fund.

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PULSFORD v. RICHARDS.

March 16, 17,
21, 22, 23.

April 18.

THIS bill was filed by *Pulsford*, a shareholder in the *West Flanders* Railway, against the Defendants *Richards*, *Hayter*, *Fearon*, *Cubitt* and *Ryan*, to rescind a contract for taking shares in the company, on the ground of the misrepresentation and suppression by them in the prospectus of material facts.

Where a party, by misrepresentation, draws another into a contract, such party may be compelled to make good the representation, if that be possible, but if it be impossi-

Adopting

ble, the person deceived may avoid the contract. The same principle applies, though the party, at the time, believed the statement to be true, if in the due discharge of his duty, he ought to have then known otherwise.

Third parties, who by false representations induce others to enter into contracts, are estopped from afterwards falsifying their statement, and, if necessary, may be compelled to make them good. But the false statement of one, not a party to the agreement entered into on the faith of it, is not a ground for avoiding it.

Misrepresentations may be either by a suppression of the truth or an assertion of what is false; but to be the ground for avoiding the contract, the representation must be one "*duns locum contractui*," or such, that it is reasonable to infer, that in its absence the party deceived would not have entered into the contract.

Persons who take shares on the formation of a company, and the directors who form it, are contracting parties, and the prospectus issued is a representation "*quæ dat locum contractui*."

A right to make a foreign railway was conceded to C. and the four Defendants, and the grant was partly obtained through the influence and exertions of C., whose name was inserted for the benefit of the Defendants. The Defendants agreed to appoint C. their agent for the construction, &c., of the line, and in consideration of such services, to pay him 4*l.* per cent. on the outlay. After this, they issued a prospectus for the formation of a company, proposing to transfer the grant and all benefits to the company, (subject to a stated reservation to themselves); but they omitted to mention anything respecting the contract with C. The Plaintiff took shares on the faith of the prospectus, and afterwards sought to return them and set aside his contract, on the ground of misrepresentations in the prospectus. The Court considered, that the duties to be performed by C. were important and indispensable, and that he was peculiarly fitted for them;—that there was no evidence of the value of his services, but assuming the remuneration to be excessive and exorbitant, still that it did not furnish a ground for annulling the contract, though it might possibly be a reason for charging the directors.

Projectors of a railway retained 4,000 shares for themselves, but did not state the fact in their prospectus. Held not to be a ground for annulling a contract by the Plaintiff to take shares in the concern.

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Adopting the conclusions arrived at by the Court, the short result of a large mass of papers was as follows:—

On the 28th of *March*, 1845, *Chantrell*, who held an official situation in *Belgium*, as inspector of railways, ascertained that the *Belgian* government intended to propose the formation of a railway in *West Flanders*. He proposed to Mr. *Fearon* to take up the scheme with Mr. *Richards* (whose name had some considerable weight with the *Belgian* minister of public works), who gave a favourable but not a definite answer. On the 7th of *April*, *Chantrell*, having made arrangements to prevent the competition of a party who had some claims to the grant, applied to the minister for the right of forming the line, and on the 10th of *April*, the minister gave *Chantrell* the usual conditional promise of a preliminary convention to be submitted to the chambers, in the belief that he was applying on behalf of *Fearon* and *Richards*, as well as himself. *Chantrell* immediately set out for *England*, and on the 13th of *April*, had interviews with *Richards* and *Fearon*, who were favourably disposed to take up the scheme, and sent an engineer over to *Belgium* to examine the whole matter. The remuneration to *Chantrell* seemed to have been discussed, and it was arranged, that he should be the contractor for the formation of the line, upon terms based on the estimates of the *Belgian* engineers.

Communications afterwards took place in *Belgium*, between *Chantrell*, the engineer and the minister, and ultimately, on the 18th of *April*, the minister agreed to make the grant to *Richards*, *Fearon* and *Chantrell*, as “*cessionnaires* ;” and on the 21st of *April*, the provisional convention was signed, but the names of *Cubitt* and *Hayter*, who afterwards joined the undertaking, were added, as “*cessionnaires*.”

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On the 23rd of *April*, *Cubitt* arrived in *Brussels* with the deposit money, and with instructions as to arrangements to be made with *Chantrell*, "in lieu of his interest in the grant," and *Chantrell* wrote a letter, at *Cubitt's* dictation, stating, that his name was inserted in the grant only nominally, but to all intents and purposes for the four others; "upon the condition," that he was to have the contract for forming the lines, and 4,000 shares. A postscript was added, that he was ready, in lieu of that arrangement, to become their general agent for making the railway, receiving a "certain percentage on the whole concern."

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In the early part of *May*, 1845, the grant was confirmed by the chambers, and duly signed by the King of the *Belgians*.

The grant having been obtained through the exertions and influence of *Chantrell*, the next matter considered by him and the four other "*concessionaires*" was, as to the situation in which *Chantrell* was thereafter to stand in relation to the project, and how he was to be remunerated for the trouble and exertions he had used in obtaining this grant, or his interest in it. Considerable discussion took place on this subject; it was at first proposed, that he should be the contractor for the formation of the railway, according to the arrangement which had been entered into in *London*, on the 14th of *April*, 1845, in which case, he was to have the contract based on the estimates of the government engineer of the costs of forming the line. This however was abandoned; and the discussion finally resulted in the signing of the two agreements in question. They both bore date the 12th of *May*, 1845, and were both made between Mr. *Richards* and Mr. *Cubitt*, on behalf of themselves, and Mr. *Hayter* and Mr. *Fearon*, of the one
 part,

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part, and Mr. *Chantrell*, of the other part. By the first of these agreements, it was agreed, that *Chantrell* should superintend and manage, as agent of the directors, the construction of all works connected with the railway, purchasing lands and materials for working the line, and doing all other matters necessary to the perfection of the railway for traffic, under the direction of the directors. And in consideration of such services, so to be performed to the satisfaction of the directors, and in consideration also of services already performed, it was agreed, that *Chantrell* should receive 4*l.* per cent. on all sums so expended. By the second of these instruments, it was further agreed, that if the expenditure should fall short of 8,200*l.* per mile, for the formation of the line, and of 1,800*l.* per mile for the working stock, which was the calculated cost, *Chantrell* should, in that case, receive 10*l.* per cent. upon the saving so made. It was thereby further agreed, that the 4,000 shares already mentioned were to be allotted to him, to be disposed of amongst persons in *Belgium*, and that the deposit on the shares should be considered as a first instalment, upon what should become due to him in respect of the 4*l.* per cent. or the 10*l.* per cent. he was to receive under the final agreement. And that when the lines were opened, *Chantrell* should be the *directeur-gérant*, at a fixed salary, not exceeding 500*l.* per annum.

· *Ryan* afterwards agreed to become a director of the company.

In June, 1845, the projectors issued a prospectus for the formation of a company, to consist of 42,000 shares of 20*l.* each, and which, after describing the particulars of the railway and its advantages, contained the following material passages:—

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"The general management of the line, and of the affairs connected with it, will be under the control of the directors. They have secured the services of a most able and efficient *directeur-gérant* in *Belgium* (Mr. *Chantrell*), who will have an immediate interest in maintaining the strictest economy in the management and in the general prosperity of the concern. Mr. *Chantrell* has been the chief manager of the traffic for the Belgian government, on the state lines, from 1840; this appointment he proposes to relinquish, and to devote himself exclusively and at once to the purposes of this undertaking.


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"The concessionaires, having deposited the caution money," have become the grantees and absolute owners of these lines for a term of ninety years, free "from all rates, taxes or charges, of whatsoever description, local or national."

"This grant, and all the benefits arising from it, they transfer to the company, subject to the reservations in favour of the fondateurs after mentioned."

"The profits of the undertaking, after the opening of the line, will be appropriated as follows:—After payment of 5*l.* per cent. per annum to the shareholders, and a reserve of 5*l.* per cent. on such 5*l.* per cent., for a reserved fund, the surplus will be thus divided, viz. sixteen-twentieths (less 5*l.* per cent. to be added to the reserved fund) to the shareholders, and four-twentieths (less 5*l.* per cent., to be also added to the reserve fund) to the fondateurs. This reserved fund may be appropriated according to the statutes, either for the benefit of the proprietors, or for the unforeseen wants of the undertaking. In addition to the above, the fondateurs, by way of reimbursement for the expenses, liabilities and

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and payments already incurred, reserve to themselves a commission of 3*l.* per cent. upon the capital.

The Plaintiff, on the faith of the prospectus, took originally 2,015 shares, and after he had become perfectly aware of all the facts, he purchased 985 additional shares, in respect of which he claimed no relief.

The Plaintiff by this bill insisted, that the prospectus was deceptive, both by the suppression of what was true, and the suggestion of what was false. 1st. Because it omitted the agreement which had been entered into between the directors and *Chantrell*. 2ndly. Because it omitted to state that the directors had appropriated to themselves not less than 20,000 shares. 3rdly. Because it omitted to state that 4,000 shares had been allotted to *Chantrell*. And lastly, because it contained a positive misrepresentation, in asserting "that the grant and all the benefits arising from it had been transferred to the company, subject to the reservation in favour of the fondateurs," subsequently mentioned in the prospectus, and which reservation is there stated to be a commission of 3*l.* per cent. on the capital, while, in fact, under the agreement with *Chantrell*, a further charge of 4*l.* per cent. on the whole capital had been created in his favour.

The cause now came on for hearing.

Sir *Fitzroy Kelly*, Mr. *R. Palmer*, Mr. *Daniel*, and Mr. *Elderton*, for the Plaintiff.

Mr. *Rolt*, Mr. *Hobhouse* and Mr. *Bateman*, for *Ryan*.

The Solicitor-General (Mr. *Bethell*), Mr. *Baily* and Mr. *Thring*, for the four other Defendants.

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The following cases were relied on, *Nelthorpe v. Holgate* (a); *Burnes v. Pennell* (b); *Hichens v. Congreve* (c); *Edwards v. M'Leay* (d); *Pasley v. Freeman* (e); *Langridge v. Levy* (f); *Cridland v. Lord De Mauley* (g); *Foss v. Harbottle* (h); *Kent v. Jackson* (i); *Macbride v. Lindsay* (k); *Ex parte Morgan* (l); *Stainbank v. Fernley* (m); *Sedden v. Connell* (n); *Gibson v. D'Este* (o); *Burrowes v. Lock* (p); *In re Grant* (q); *Reynell v. Sprye* (r).

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The MASTER of the ROLLS reserved his judgment.

The MASTER of the ROLLS.

April 18.

This suit is instituted by the Plaintiff, for the purpose of obtaining the declaration of the Court, that the proceedings of the Defendants, as directors of the *West Flanders* Railway, so far as relate to the raising of the capital of the company, by issuing shares, are fraudulent and void as between them and the Plaintiff, and for the relief consequential upon that declaration; which relief would involve the payment, by the Defendants to the Plaintiff, of the sums paid for deposit and calls on these shares, with interest thereon, the Plaintiff on his part returning the shares thus taken, and accounting for the interest

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| (a) 1 <i>Coll.</i> 203. | (k) 9 <i>Hare</i> , 574. |
| (b) 2 <i>H. L. Cas.</i> 497. | (l) 1 <i>Hall & Tw.</i> 320; 1 |
| (c) 4 <i>Russ.</i> 562; 4 <i>Sim.</i> 420. | <i>Macn. & Gor.</i> 225. |
| (d) 2 <i>Swanst.</i> 287; <i>G. Coop.</i> | (m) 9 <i>Sim.</i> 556. |
| 308. | (n) 10 <i>Sim.</i> 58. |
| (e) 3 <i>Term Rep.</i> 51. | (o) 2 <i>Y. & C. C. C.</i> 542. |
| (f) 2 <i>Mee. & W.</i> 519; 4 <i>Mee.</i> | (p) 10 <i>Ves.</i> 470. |
| <i>& W.</i> 337. | (q) 7 <i>Moo. P. C. C.</i> 141. |
| (g) 1 <i>De G. & Sm.</i> 459. | (r) 8 <i>Hare</i> , 222; 1 <i>De G.</i> |
| (h) 2 <i>Hare</i> , 461. | <i>M. & Gor.</i> 660. |
| (i) 14 <i>Beau.</i> 367; 2 <i>De G.</i> | |
| <i>M. & Gor.</i> 49. | |

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interest on such deposit and calls, and for the dividends which he has received on them. The ground on which this relief is asked is that principle of equity which declares, that the wilful misrepresentation of one contracting party, which draws another into a contract, shall, at the option of the person deceived, enable him to avoid or enforce that contract. I think it convenient, in the present case, to state my view of this principle of equity, before applying it to the facts of this case as they appear to me to be established by the evidence in the cause.

The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth, in all the dealings of mankind. The principle itself is universal in its application to these cases of contract. It affects not merely the parties to the agreement, but it affects also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty, they ought to have known, or if they had formerly known and ought to have remembered, the fact which negatives the representation made. A strong illustration of this is to be found in the case of *Burrowes v. Lock*(a); and in my opinion (as I held in the case of *Money v. Jorden*(b)), this principle applies to all representations made, on the faith of which other persons enter into engagements, so that whether the representation were true or false, at the time when it was made, he who made it shall not only be restrained from

(a) 10 Ves. 470.

(b) 15 Beav. 372.

from falsifying it thereafter, but shall, if necessary, be compelled to make good the truth of that which he asserted.

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The results, however, which flow from the application of this principle differ materially in different cases. In the case where the false representation is made by one who is no party to the agreement, entered into on the faith of it, the contract cannot be avoided, and all that equity can then do is to compel the person who made the representation to make good his assertion, as far as this may be possible. In cases, however, where the false misrepresentation is made by a person who is a party to the agreement, the power of equity is more extensive; there the contract itself may be set aside, if the nature of the case and condition of the parties will admit of it, or, the person who made the assertion may be compelled to make it good. The distinction between the cases where the person deceived is at liberty to avoid the contract, or where the Court will affirm it, giving him compensation only, are not very clearly defined. This question usually arises on the specific performance of contracts for the sale of property; and the principle which I apprehend governs the cases, although it is, in some instances, of very difficult application, and leads to refined distinctions, is the following, viz., that if the representation made be one which can be made good, the party to the contract shall be compelled or may be at liberty to do so; but if the representation made be one which cannot be made good, the person deceived shall be at liberty, if he please, to avoid the contract. Thus, if a man misrepresent the tenure or situation of an estate, as if he sell an estate as freehold which proves to be copyhold or leasehold, or if he describes it as situate within a mile of some particular town, when, in truth, it is several miles distant, such a misrepresentation,

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as it cannot be made true, would, at the option of the party deceived, annul the contract. But if the property be subject to incumbrances concealed from the purchaser, the seller must make good his statement and redeem those charges; and even in the cases where the property is subject to a small rent not stated, or the rental is somewhat less than it was represented, the Court does not annul the contract, but compels the seller to allow a sufficient deduction from the purchase money. It does so on this principle:—that, by this means, he in fact makes good his representation, and that the statement made was not such as, in substance, deceived the purchaser as to the nature and quality of the thing he bought. With respect to the character or nature of the misrepresentation itself, it is clear, that it may be positive or negative; that it may consist as much in the suppression of what is true as in the assertion of what is false; and it is almost needless to add that it must appear, that the person deceived entered into the contract on the faith of it. To use the expression of the *Roman* law (much commented upon in the argument before me), it must be a representation “*dans locum contractui*,” that is, a representation giving occasion to the contract: the proper interpretation of which appears to me to be, the assertion of a fact on which the person entering into the contract relied, and in the absence of which, it is reasonable to infer, that he would not have entered into it; or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether.

Having stated these principles, the effect of their application to the present case remains to be considered. I entertain no doubt, that the persons who take shares on the formation of a company and the directors who form it are contracting parties, to whom the principles
 I have

I have stated are applicable. I am also of opinion, that the prospectus issued by the directors is the representation *quæ dat locum contractui*. The Plaintiff and Defendants stand in this relation of shareholder and directors. The representation which created it was a prospectus issued on the 5th *June*, 1845. What therefore in my opinion I have to consider in the present case is, whether the prospectus so issued contained such misrepresentation or suppression of existing facts, as, if the real truth had been stated, it is reasonable to believe that the Plaintiff would not have entered into the contract, that is, that he would not have taken the shares which were allotted to him, and those which he purchased in the course of that year. For this purpose what passed subsequently to the issuing of the prospectus has, in my opinion, no bearing on the question, except so far as it may throw a light upon the acts of the Defendants in issuing the prospectus and of the Plaintiff in taking shares upon the faith of it.

The complaint of the Plaintiff is, that the prospectus was deceptive, both by the suppression of what was true and the suggestion of what was false; first, because it omitted an agreement, which had been entered into between the directors and a *Belgian* gentleman of the name of *Chantrell*, which was subsequently confirmed by them; secondly, because it omitted to state that the directors had appropriated to themselves not less than 20,000 shares; thirdly, because it omitted to state that 4,000 shares had been allotted to *Chantrell*, and lastly, because that it contained a positive misrepresentation, in asserting that the grant and all the benefits arising from it had been transferred to the company, subject to the reservation in favour of the *fondateurs* subsequently mentioned in the prospectus, and which reservation is there stated to be a commission of 3*l.* per cent. on the

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capital, while in fact, under the agreement with *Chantrell*, a further charge of 4l. per cent. on the whole capital had been created in favour of that gentleman.

The objection to the honesty of the prospectus, on the ground that it contained no mention of the shares allotted to the directors or of those allotted to *Chantrell*, does not appear to me to be sustainable. It is difficult to say what might not avoid a contract, if the absence of stating what shares had previously been allotted to various persons connected with the undertaking would necessarily produce this effect. I am far from stating that such concealment might not, in some cases, become material, where it is connected with some other fact indicative of fraud, and possibly more so in the case where the directors had taken too few, than where they had reserved to themselves too many shares. But, in the present case, I am convinced by the evidence, that the directors (who were all of them gentlemen at that time possessed of considerable means), took these shares *bonâ fide* and that their conduct in so doing cannot be imputed to them as a fraud, and that the statement of that fact would not have induced any person (otherwise desirous of becoming a shareholder) to abstain from taking shares. It is obvious also, that in the exercise of their known discretion as directors of the company, they might, subsequently to their issuing of the prospectus, have allotted what shares they pleased to themselves or others. If they did so improperly, and by reason thereof this company has fallen into difficulties, or become less profitable than might otherwise have been expected, it is possible that they may be accountable to the shareholders, as directors, inasmuch as, in that character, they are bound to do the best in their power for the shareholders, towards whom they stand in a fiduciary relation. But that is not the frame of this
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suit, and on this point therefore I purposely express no opinion.

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It is material to bear in mind throughout the consideration of this case, that the suit is framed to annul the contract, and not to make the Defendants answerable for their conduct under it. It repudiates the contract altogether; it does not seek to enforce the performance of the duties, which attach to the Defendants on the footing of that contract. The question, therefore, on this objection is, whether the number of shares allotted or agreed to be allotted by the directors to themselves and to *Chantrell*, for persons in *Belgium*, was a fact so material to the success of the undertaking that the knowledge of it was a matter which the directors were bound to communicate to the public, in order to enable them to come to a sound conclusion, as to the probable success of the undertaking, in which they were invited to take a part. I am of opinion that it was not, and that the absence from the prospectus of all information on this subject, although coupled with the statement of the shares allotted to the *Sambre* and *Meuse* Railway Company, is not sufficient to enable any person to whom shares were allotted to avoid the contract, on the ground of such suppression. On the contrary, I believe that the circumstance that so many shares had been taken, *bonâ fide* by gentlemen of character and property, would have added to the desire of the public to become allottees of the remaining shares.

The other two objections made to the honesty of the prospectus resolve themselves into one, viz.:—The concealment of the agreement with *Chantrell*, first, by the absence of any statement respecting it, and secondly, by the insertion of a statement, inferentially negating the existence of any such agreement. This is, in truth,



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the material question in the cause, and, accordingly, this it is to which the principal arguments have been directed.

For the purpose of coming to a conclusion on this subject, I think it proper to consider, in what relation the directors and *Chantrell* stood to each other at the time when this prospectus was issued; and for this purpose, I shall state the facts, as they appear to me to be established by the evidence in the cause, and I do this the rather because, by so doing, I shall express my opinion on the result of that evidence, regarding which there has been much discussion. Although in some places it is imperfect and therefore obscure, there is not, in my opinion, any contradiction in the testimony given, whether oral or written. [*His Honor recapitulated the facts, as before stated, and proceeded.*] The question is, whether, in the circumstances I have detailed, the absence from the prospectus of all mention of these agreements, coupled with the statement, that the whole benefit of the undertaking, beyond the 3*l.* per cent. given to the *fondateurs*, was transferred to the shareholders, is such a misrepresentation as entitles the Plaintiff to cancel the obligations entered into on the faith of that prospectus.

On behalf of the Plaintiff it is contended, that the arrangement was, in truth, a purchase of the undertaking from *Chantrell*, at the price of 4*l.* per cent. on the gross cost of it, and that it was a fraud to conceal from the persons solicited to become shareholders so material a circumstance, which was analogous to a species of rent, or charge of 32,000*l.* fixed upon the line, which must seriously have affected the probable success of the concern.

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On the other hand, the Defendants contend, that *Chantrell* was the mere agent or servant of the company, and that he simply agreed to perform such services as must have been performed by some one, and that 4l. per cent. on the gross expenditure of 800,000l., large as it may seem, was only a fair remuneration for the duties which *Chantrell* had to perform, having regard to his peculiar abilities and fitness for this purpose; and that even if his previous services, or what in one letter Mr. *Richards* calls his "bringing out of the line," was a part of the consideration for his being so employed, that it does not thence follow, that his remuneration was excessive. That the employment of a person in his own business, at the fair market rate of remuneration, is a benefit for which persons will take great pains and use vast exertions; and that it is every day's experience, that solicitors and engineers will undergo much labour, and incur great expense, in the hope and with the expectation of being able to form a company for the construction of a railway, with no other object than the prospect of being employed, at a fair rate of remuneration, in the performance of such duties as they are competent to perform, and which must be performed by some one. And they refer, as evidencing the *bona fides* of the directors in this matter, to the circumstance, that when it was proposed to reward Mr. *Chantrell*, by giving him the contract for the formation of the line, he was to take it on the estimate of the government engineer, who might be expected to state a fair sum for that purpose, and what they would have to pay to whomsoever they might employ. They also insist, that it is shown by the correspondence, and especially by the letter of Mr. *Richards* to Mr. *Cubitt* of the 7th of May, 1845, that their intention was, that he should not have any greater remuneration

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ration than he could have obtained if he had become the contractor for the formation of the line, at a fair and reasonable estimate. A careful perusal of the evidence and consideration of the subject has brought me to the conclusion, that the services agreed to be performed by Mr. *Chantrell* must have been performed by some one. I am of opinion, that some competent person must have been employed by the directors to superintend and manage the expenditure of the money in the formation of the line, and in the purchase of the working materials. That some competent person must have been employed to negotiate with the proprietors whose land was required for the formation of the line; and also to ascertain that the ostensible proprietors were the real owners of the land conveyed, although undoubtedly the different tenure of land and the system of registration prevailing in that country would render that latter duty much less difficult and expensive than a similar duty would have been in this country. I have arrived, therefore, at this first step, that the duties agreed to be performed were important and indispensable, and that Mr. *Chantrell* was peculiarly well fitted to perform them. It was therefore, in my opinion, the duty of the directors to employ such a person, if he could be obtained at a fair remuneration. There is not any evidence in the cause, on either side, by which I am enabled to ascertain what is the fair market value for which the services of a gentleman, as competent as Mr. *Chantrell*, could have been obtained in *Belgium*.

Assuming, for the purpose of considering the question, that the remuneration given was grossly excessive and exorbitant, and that the directors had so managed it, that the company was bound to pay this amount, would the omission to communicate this to the public
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be a ground for annulling the contract made, under which they were induced to accept shares? Referring to the principles I stated in the outset, as being those which govern cases of this nature, I am of opinion, that it cannot have that effect. This was not the suppression of a fact that affected the intrinsic value of the undertaking. That depended on the line of the projected railway, the population, the commercial wealth and traffic of the places through which it was to pass, the difficulties of the construction and the cost of the lands required.

Extravagance in the formation of a line of railway is, in my opinion, a question of liability of the individual directors to the shareholders, but not a ground for annulling the contract between them. If the services to be rendered by Mr. *Chantrell* were indispensable, then the fact that such services must be obtained is implied in the statement of the project for the formation of the railway, and the only question that arises is, the *quantum* of the remuneration which was and ought to be paid for such services. Assume that Mr. *Chantrell* had been a mere stranger to the directors, and had been engaged by them under agreements, the same in their terms as those of the 12th of *May*, 1845, but subsequent in date to the issuing of the prospectus and the formation of the company, could any question have arisen other than this, what sums ought to be allowed to the directors in their accounts as between themselves and the shareholders, in respect of these payments to Mr. *Chantrell*? I am of opinion, that, in such a case, the only relief this Court could have given must have been confined to such an account. If the arrangement for the formation of the line is made before the prospectus is issued, still, in my opinion, the relief afforded must be the same. The absence of all statement as to
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the costs by which the line can be formed means this, that it is to be formed, and the services of competent persons obtained, at such fair and reasonable prices as will be necessary to procure such services. That statement, whether expressed or implied, the directors shall be compelled to make good. Without that statement, the ordinary trust imposed upon directors, in their relations towards their shareholders, imposes this duty upon them. If, indeed, the case had been, that a heavy irredeemable rental was, at all events, charged upon and payable out of the project, either to the *Belgian* government or to some other persons, in addition to the cost of construction, to which this case was attempted, in argument, to be assimilated, the case might have been different; because then, the omission would have been of something affecting the value of the undertaking inherent to and inseparable from it, in addition to the expense of the formation of the line, which could not be known unless by express statement. But the costs of formation are known by every one to be inseparable from the project, and if these services were indispensable, they were a part of that cost. It is argued, no doubt with accuracy, that if the undertaking were bound by this contract, and the directors were unable to make good to the shareholders the amount improperly expended, the value of the undertaking itself would be permanently affected by the arrangement, and that the shareholders ought not to be compelled to take the indemnity of the directors. I think it unnecessary to discuss to what extent, in cases of improvident or improper contracts entered into by directors for the construction of the line before the issuing of the prospectus, the company would be bound, and how far the responsibility of the directors would or would not be treated as a sufficient indemnity to the shareholders. It is sufficient to say, in this case, that in the caution money deposited would have been found

found amply sufficient to secure the repayment of any excess of expenditure, which, under the contract, Mr. *Chantrell* was entitled to receive beyond the price for which such services ought to have been remunerated, and that all their shares and property in the company would also have been liable for this purpose. Nor is it clear, that any indemnity would have been required, as, if the Court had considered that the Defendants were bound to pay *Chantrell* and they did so, the shareholders would be wholly exonerated.

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It is also urged, on behalf of the Plaintiff, that the transaction must be viewed in this light :—viz. that the four first Defendants had purchased the scheme from Mr. *Chantrell*, and then had themselves sold it to the company. If this were the transaction, it would have appeared to me to have been analogous to the case where one person sells a property which he has himself bought, on which the original vendor has a lien for his unpaid purchase money. The second purchaser could not avoid his contract by reason of this lien. All that he could require would be, that the property should be conveyed to him free from any such lien, which, in this case, would be that the directors should exonerate the undertaking from the price due to *Chantrell* as the condition of his selling it.

But this is not, in my opinion, a correct view of the result of the evidence.

It is no doubt urged with much force, that it is but fair to assume, that a considerable or at least some portion of the price paid to *Chantrell* is attributable to his position with regard to the undertaking, from the promise he had obtained from the minister, the advantage of which was secured to him by his being a *concessionaire*,
and


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and that "his interest in the line," as it is called in one of Mr. *Richards's* letters, is treated throughout as a thing to be paid for. The evidence, as I have already said, does not enable me to come to a satisfactory conclusion, as to what was a fair and reasonable price to be paid to Mr. *Chantrell* for his services, as distinguished from his interest in the grant. The sum to be paid to him undoubtedly appears to me to be large, but I am not aware, nor does the evidence supply the information, what expenses he may be obliged necessarily to incur for the purpose of performing them. Such expenses would undoubtedly be very large in this country, and they may possibly be considerable in *Belgium*. Some expenses there must have been, and as to those, I am informed that the books of the company, which are in evidence, contain no item of charge against the company; but this is a fact which I have not myself verified by the inspection of these books. But whatever weight may be justly attributable to this argument derived from this circumstance, it cannot, in my opinion, vary the result to which I must come in this frame of suit. To the extent that the price is a fair remuneration for the services of Mr. *Chantrell*, the Plaintiff had no cause for complaint; to the extent that the price exceeds that amount, it is a matter to be questioned and set right in a suit to make the Defendants account, in their character of directors, and this whether that excess be from improper remuneration of those services, or whether it was the price paid for his abandonment of his interest in the line.

This suit is not framed for that purpose; and if it were, the Plaintiff has adduced no evidence to show how the price ought to be apportioned, which, if the services to be performed by *Chantrell* were essential for the railway

way and could not be obtained gratuitously, it would have been incumbent on him to have done.

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There are various circumstances which confirm my opinion, that the only relief (if any) which, in this case, could properly have been asked, would have been, not to annul the contract, but on the footing of it, to make the Defendants account for the due discharge of their duties as directors to the shareholders, as their *cestuis que trust*. I select one of the strongest, and one which convinces me that the insertion of the fullest statement relative to the contract entered into with Mr. *Chantrell* would not have affected the Plaintiff's opinion of the value of the scheme, and this is the fact, that after he became fully aware of the contract and of the circumstances connected with it, and after he had already taken steps for instituting these proceedings, he himself purchased 985 shares in this undertaking, in respect of which shares he seeks no relief, in respect of which he still claims to be a proprietor and part owner of the railway, and in respect of which he may, to-morrow, if he can establish any proper case by evidence, file a bill against these very Defendants, in their character of directors, to make them accountable for the same transaction, in respect of which he now seeks to annul the relation subsisting between them in respect of the 2015 shares bought by and allotted to him in *July* and *August*, 1845. That he purchased the first at a premium and the last at a discount, that having regard to the existing state of the company he may have given too much for the first set of shares and too little for the second, cannot, in any respect, affect the principle on which I must regard the question before me.

The success of the scheme could in no way depend upon that variation in price. It is true that upon the
price

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price paid by him may depend the question whether the investment will be a profitable one or not; but unless he had expected the scheme to succeed, he would manifestly not have bought any shares, under any circumstances, unless upon the principle, which the Court will not recognize, of engaging in a gaming speculation to obtain a profit by the subsequent sale of the shares. And this consideration is the more important, because if the Plaintiff obtains the decree he asks, it is impossible to say that it will not affect all other shares of the company, including the very shares subsequently bought by him; in respect of which, therefore, the original allottees may be entitled to the same relief, in substance, as that now sought by the Plaintiff, modified only to some extent in consequence of the right arising from the subsequent sale of those shares to the present Plaintiff.

Upon the assumption, therefore, that the price agreed to be paid to Mr. *Chantrell* for his services is exorbitant when regarded solely with reference to the services to be performed subsequently to the date thereof, and that in truth his previous services and interests in the grant formed the principal consideration for the agreement, I am of opinion that the Plaintiff has mistaken his equity and that he is not entitled to rescind the contract, and to be exonerated from the liability incurred by becoming the owner of 2,015 shares in *July* and *August*, 1845.

I abstain from going into the question of the accounts, rendered from time to time to the shareholders, and those contained in the book. They have in truth no bearing upon the question before me. They might have been relevant to the question of *laches*, if such a case had been urged against the Plaintiff. In this case, however, if in other respects the Plaintiff had been entitled to relief, it could not have been resisted on the ground of any negligence

negligence or delay in enforcing his claims. I regret also much to find that the bill abounds with charges made and issues raised respecting the mode of keeping the books, which, if at all, could only have been material if the relief sought had been to make the Defendants liable to the shareholders as directors and trustees, but which have no bearing upon the question in this suit, which regards solely the rescinding of the contract.

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The result is, that this suit fails in every respect, and that it must be dismissed with costs.

I am of opinion that the two Defendants who, in 1828, withheld the agreement with *Chantrell*, acted ill-advisedly. It was the duty of directors to show it to their *cestui que trust*, and the more especially as their defence is, that this was an agreement necessary for the construction of the line, and entered into by them for the benefit of the company. Undoubtedly, if the withholding of that agreement had occasioned any costs, I should have thought it my duty to throw those costs upon these two Defendants; but it is obvious that this cannot have been the case, or that they are too minute to be separable from the costs of the rest of the suit.

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*In re* BUCKLEY'S TRUST.

April 19.

A. B. purchased an estate, subject to a pecuniary charge. Held, that he was not entitled to pay the amount of the charge into Court under the Trustee Relief Act.

THE testator, by his will, directed his executors to place out at interest, upon real security, two sums of 500*l.* each, and to pay the interest thereof to his daughter, *Anna Hodgson*, for life, and after her decease, to divide the capital between all her children, and the issue of such of them as should be then dead. And subject to and charged with the aforesaid pecuniary legacies, the testator devised his real estates to his four sons absolutely. The personal estate was insufficient for payment of the debts and legacies, and the sums in question remained charged on the real estates. In 1847, soon after the testator's death, part of the real estates was sold and conveyed to the Petitioners Messrs. *Ormerod*, charged with the two sums of 500*l.* each, in exoneration of the residue of the real estates, and by a separate deed, Messrs. *Ormerod* covenanted to pay those sums to the persons legally entitled.

Anna Hodgson died in *January* 1851, leaving four children her surviving, but she had had two other children, who died under twenty-one, and unmarried, and to whom administration had not been taken out. The four surviving children had all attained twenty-one, and were resident in *Australia*, and on the death of their mother they appointed Mr. *Sharp*, their attorney, to receive the legacies. *Sharp* made application accordingly to the Petitioners for payment, who being advised that it was doubtful whether all the children did not take a vested interest, and there being no representative of the deceased children, declined to pay the attorney, but

but in *February*, 1852, they paid the two sums into Court, under the provisions of the Trustees Relief Acts (a). Mr. *Sharp*, alleging that the payment into Court was not authorized by these acts, refused to recognize it, and insisted upon payment; whereupon Messrs. *Ormerod* presented a petition, alleging that they came within the words of the act, as "trustees or other persons, having in their hands any money belonging to any trust whatsoever," and praying a declaration, that they came within the meaning and intention of the act, and that an order might be made for investment of the funds, in accordance with the General Order of the 7th *May*, 1852 (b). But if they did not come within the act, then they asked that the money might be paid back to them, and that in either case, the costs might be paid out of the fund.

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Mr. *Elmsley* and Mr. *Crofts*, in support of the petition. The words of the first section of the act are wide enough to include the Petitioners. It enacts, that all trustees, executors, administrators, and other persons, having in their hands money belonging to any trust whatsoever, shall be at liberty to pay the same into Court; so that it is not necessary that persons should fill a fiduciary character, in order to bring them within the terms of the act. The only question is, whether this is trust money, which is to be determined by referring to the will charging the real estate with the payment of it. The Petitioners having purchased the estate, with notice of the legacies so charged, were bound by the trust and compellable to raise them.

Mr. *J. V. Prior*, *contra*, contended, that the Petitioners
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(a) 10 & 11 *Vict.* c. 96; and (b) *Ord. Can.* 457.
12 & 13 *Vict.* c. 74.

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were not trustees within the act, and that the words "other persons" would be satisfied by applying them to persons not strictly trustees, having money in their hands. That if persons situated like the Petitioners were allowed to pay the amount of a charge into Court, the consequence would be, that the costs of a proceeding, altogether unnecessary, would fall upon legatees. He added that there would also be a loss of the interest, from the time of payment into Court.

Mr. *Elmsley*, in reply, argued, that the statute being remedial, ought to be construed liberally.

The MASTER of the ROLLS.

I think that this case does not come within the act. What the act intended is expressed by the words, that "all trustees, executors, administrators, or other persons, having in their hands money belonging to any trust," in which case they shall be at liberty to pay it into Court. When the case was first mentioned, I did not see what money the Petitioners had in their hands belonging to any trust. What the act intended was this:—Where an existing fund, affected by a trust, created either by the original instrument, or by operation of law, is in the hands of persons who are unable to ascertain to whom it is legally payable, such persons may pay it into Court, under the provisions of the act. But here, there is no money at all in the hands of the Petitioners subject to any trust. What they have is an estate subject to a charge, and I am asked to decide that they are entitled to raise this sum of money, for the very purpose of creating a trust fund, in which other persons are to be interested, and in this way to enable the Petitioners to take advantage of the act. This, however, is neither the intention of the statute,

statute, nor is it fair towards the parties interested; for if I were to allow this, the effect would be, to give every person entitled to land subject to a charge a right to pay the money into Court, instead of into the proper hands. Where a legacy is given by a testator, and it is charged upon his real estates, the party entitled to it is entitled to the money, clear from the costs of raising it; but if I were to hold this case to be within the act, the parties entitled to the charge would themselves have to pay the costs.

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I am of opinion that the act was not intended to meet such a case as this, and was only meant to extend to a case where there is an existing trust fund in the hands of some person who is not entitled to any beneficial interest in it; and the act then says, "you shall be entitled to relieve yourself from responsibility, by payment of the fund into Court." If these two sums of 500*l.* had come to the hands of the Petitioners, as belonging to *John Smith*, and they could not ascertain who he was, they would be at liberty to pay them into Court under the act; but if I were to decide that the Petitioners come within the act, I see no reason why a mortgagor might not pay the mortgage money into Court, saying he had a trust fund in his hands, and so liberate his estates, and throw all the expenses upon the mortgagee.

The point appears to be new, no decision having been cited; but the only order I can make is, to direct the repayment of the money to the Petitioners, and that they pay the Respondents their costs.

1853.



PRESTON v. The LIVERPOOL, MANCHESTER
and NEWCASTLE-UPON-TYNE Junction Rail-
way Company.

April 20, 21.

A railway company held not bound by a contract entered into by the projectors prior to their incorporation.

The projectors of a railway company entered into a contract with a landowner for the purchase of the land required. Subsequently, the act passed establishing and incorporating the company. The company abandoned the undertaking, without having done anything to adopt the contract, except by staking out the intended line. Held, that the company were not bound, the contract not being under the corporate seal, and there being no sufficient adoption of it.

IN 1845, a railway was projected which was to pass through the Plaintiff's estate, called *Flasby Hall*, and to be called the *Lancashire and North Yorkshire Railway*, and the usual proceedings were taken to obtain an act to authorize its construction.

The Plaintiff actively opposed the project, but at length an agreement was come to between him and the projectors, and he thereupon formally withdrew his dissent, and became an assenting party to the undertaking. The agreement was to the following effect:—

“ February 5, 1846.

“ Memorandum of agreement this day made between the executive directors of the *Lancashire and North Yorkshire Railway Company* of the one part, and *Cooper Preston* of the other part. It is agreed, that, on the following conditions, the said *Cooper Preston* will and does assent to the railway being made through his property at *Flasby*, as laid down in the deposited plan of the said company:—

“ 1st. That in case the said company shall, in this or any subsequent session, obtain an act of incorporation, the said company shall pay to the said *Cooper Preston*, his heirs or assigns, the sum of 1,000*l.* for all land required by the company, for the making of the railway, and a further sum of 4,000*l.* for residential injury to the estate and hall of the said *Cooper Preston*.

“ 2nd.

"2nd. That the tunnel and railway shall be so constructed through Mr. *Preston's* property, near the *Low Wood*, so as not to damage the said wood, &c.

"3rd. That the tunnel shall be extended to the plantation, &c. and the land through which the tunnel shall be made is to be reconveyed to the said *Cooper Preston*, his heirs or assigns, and to be resoiled over, at the expense of the company.

"4th. That the company shall cause a passengers' station to be made at *Flasby*, the land required to be furnished by *Cooper Preston* at his own cost. That it is understood that this agreement shall not require Mr. *Preston* to furnish more land than is requisite for the proper making of the railway, with slopes, sidings and stations."

This agreement was signed by the Plaintiff and by Mr. *Harper* and Mr. *Yates*, two of the promoters of the scheme, and provisional or "executive" directors. Mr. *Yates* reported that he had entered into the contract, and a memorandum to that effect was in *March*, 1846, entered in the company's minute book.

Another rival railway company, called the *Liverpool, &c. Railway Company*, was, at the same time, actively engaged in promoting a bill through Parliament. The two companies amalgamated, and one act only passed, on the 26th of *June*, 1846, incorporating the Defendants (the *Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway*), and authorizing a line which was still to pass through the Plaintiff's property.

The Defendants, in *December*, in 1846, gave the Plaintiff notice of their intention to enter upon his
1 2 land,

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land, for the purpose of surveying, taking levels and setting out the line of the works, and their servants did accordingly enter, for that limited purpose, and staked out the line. The company never took possession of any part of the Plaintiff's property, and, ultimately, the undertaking was abandoned.

In *January*, 1851, the Plaintiff filed this bill, praying a declaration, that the agreement of *February*, 1846, was binding on the Defendants, and that the Defendants might be decreed to complete the purchase of the land agreed to be purchased and set out, and all other (if any) land required by the company, by paying Plaintiff the 1,000*l.*, and 4,000*l.* and expenses.

A demurrer to the bill was overruled by the Vice-Chancellor (Lord *Cranworth*)(a). No action had been brought, and the cause now came on for hearing.

Mr. *Elmsley* and Mr. *Southgate*, for the Plaintiff. This agreement is valid and binding on the Defendants. It was entered into for valuable consideration, namely, for the withdrawal of the opposition to the bill. The Defendants have obtained the consideration, and taken the benefit of the contract; they are therefore, in equity, bound to perform their part of it; *Edwards v. The Grand Junction Railway Company*(b); *Stanley v. The Chester and Birkenhead Railway Company*(c).

The decision of Lord *Cranworth* has determined the construction and validity of the contract, and that the Plaintiff is entitled to equitable relief. They also cited *Hawkes v. The Eastern Counties Railway Company*(d);
Sanderson

(a) 1 *Sim.* (N. S.) 586.

778.

(b) 1 *Myl. & Cr.* 650.

(d) 3 *De G. & Sm.* 743; 1

(c) 9 *Sim.* 264; 3 *Myl. & Cr.*

De G. M. & G. 737.

Sanderson v. Cockermouth, &c. Railway Company (a); *Webb v. Direct London and Portsmouth Railway Company* (b); *Lord James Stuart v. The London and North Western Railway Company* (c); *Southcomb v. The Bishop of Exeter* (d); *Bland v. Crowley* (e); *Gage v. The Newmarket Railway Company* (f); and they distinguished this case from *Goody v. The Colchester, &c. Railway Company* (g), in this respect, that the contract, in that case, was entered into by an existing corporation, and that here it was not.

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The Solicitor-General (Mr. *Bethell*), Mr. *R. Palmer*, and Mr. *J. J. H. Humphreys*, for the Defendants, were not called on.

The MASTER of the ROLLS.

I have read the pleadings, and will not trouble you in this case.

I have no doubt, that a legal contract was not constituted between the Plaintiff and the Defendants, that is, between the Plaintiff and the company. That was admitted by Mr. *Southgate*, and was assumed by Mr. *Elmsley*, when he stated, that no action at law could be brought against the Defendants. In fact, the company could not bind itself, except by instrument under seal. It is true, that a company may be bound, like any private individual, if there be a valid agreement between other persons and the company think fit to adopt and take the benefit of it. I have no doubt, that in such a

case,

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| (a) 11 <i>Beav.</i> 497. | (d) 6 <i>Hare</i> , 213. |
| (b) 9 <i>Hare</i> , 129; 1 <i>De G. M.</i> | (e) 6 <i>Exch. Rep.</i> 522. |
| & <i>G.</i> 521. | (f) <i>Queen's Bench</i> , May 3, |
| (c) 15 <i>Beav.</i> 513; 1 <i>De G.</i> | 1852. |
| <i>M. & G.</i> 721. | (g) <i>Post</i> , 132. |

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case, the company would be bound, and, without entering into the question, which I determined in *Gooday v. The Colchester and Stour Valley Railway Company*, that a company could not validly bind itself, except by instrument under its seal, I do not here find sufficient acts of confirmation to bind the company.

The decision I come to is not inconsistent with that of the Vice-Chancellor on the demurrer, for the agreement was not then fully stated in the bill, and an adoption since the incorporation is there distinctly alleged.

Assuming the statements of the bill to be true, it appears to me that the Vice-Chancellor could not have done otherwise than overrule the demurrer.

The case now comes before me in a different aspect, and I am of opinion, that I must dismiss the bill.

### JENINGS v. BAILY.

April 23.

A testatrix, by her will, directed her executors to pay to *M. S.* or her assigns, or permit her to receive the income of her residuary personal estate, after payment of debts, and she then bequeathed certain legacies payable after the death of *M. S.* By a second codicil she gave a legacy payable after the death of *M. S.* Held, that *M. S.* took an absolute interest in the residuary personal estate.

*ANN BAILY*, by her will, devised to *Mary Sparrow* all her real estates for life, and after the death of *Mary Sparrow* she devised to the Defendant *B. Baily*, and two other persons, a messuage or tenement each; "and all the residue of her real estate she devised to *Mary Sparrow*, her heirs and assigns for ever; and her personal estate (after payment of her debts and funeral expenses) she

she directed her executors to pay to or otherwise permit and suffer *Mary Sparrow*, or her assigns, to take, receive and enjoy the interest, dividends and annual profit and produce thereof." And after giving certain pecuniary legacies the testatrix proceeded thus :—"and from and after the death of *Mary Sparrow* I give to my dear young friends (naming four), 1,000*l.* to be equally divided. After the death of *Mary Sparrow*, I give *Charles Jenings*, Esq., 100*l.* I also give to *Benjamin Baily* aforesaid, 50*l.*" On the 24th *October*, 1833, the testatrix, by a codicil in the form of a letter addressed to *Mary Sparrow*, requested her, after she was gone, to give several sums to certain persons therein named.

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*Mary Sparrow*, by her will, gave the clear residue of the personal estate of *Ann Baily*, which consisted of 4,542*l.* : 15*s.* 3*d.* 3¼*l.* per cent. annuities, to such persons as under the statutes for distribution would have been entitled to the personal estate of *Ann Baily*, in case she had died intestate.

*Mary Sparrow* died in 1851. The Plaintiff, her executor, claimed the fund in question. The claim was resisted by *Benjamin Baily*, who contended that *Mary Sparrow* was entitled to a life interest only. In either case, the next of kin of *Ann Baily* would be entitled to the fund, but the construction to be put upon the will was nevertheless of importance, in respect of the legacy duty.

Mr. *Craig* and Mr. *G. F. White*, for the Plaintiff. *Mary Sparrow* took an absolute interest in the personal estate, subject to the payment of the debts and legacies. The testatrix made some of the legacies given by her payable immediately on her own death, and therefore it is impossible to contend, that this cuts down *Mary Sparrow's*

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*Sparrow's* interest to a life estate. They cited 1 *Roper on Legacies* (a).

Mr. *Roundell Palmer* and Mr. *Martineau*, contra, contended, that the bequest amounted merely to a gift of the annual produce of the personalty to *Mary Sparrow* for life. That this was evident, not only from the fact of the legacies being given after the death of *Mary Sparrow*, but also from the preceding clause of the will, in which she had used apt words to pass the whole interest in the real estate, when such was her intention.

*The MASTER of the ROLLS.*

It is quite clear, that the gift of the residue of the personal estate, standing alone, would have been an absolute gift; and the question therefore is, whether it is cut down by the subsequent bequests to the four *Merri-mans*. There is unquestionably some ambiguity in the words which she has used, but there is no expression of intention sufficiently strong to cut down the absolute interest previously given. I attach some weight to the circumstance, that by the letter constituting the first codicil, the testatrix requests *Mary Sparrow* to pay certain legacies, which she would not have done, if she had not intended her to take the absolute interest under the residuary bequest. Besides, there is another consideration which weighs with me in deciding in favour of an absolute interest, namely, that the other construction would make an intestacy, which the testatrix cannot be presumed to have intended. Declare therefore that the whole of the residuary estate passed to *Mary Sparrow*, subject to the legacies.

(a) 3rd edit. p. 419.

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NOTE.—See *Elton v. Shephard*, 1 Bro. C. C. 532; *Page v. Leapingwell*, 18 Ves. 463; *Haig v. Swiney*, 1 Sim. & Stu. 487.

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BOUTS v. ELLIS.

IN this suit, instituted for the administration of the estate of *Thos. Ellis*, a question was raised, whether a sum of 1,000*l.* belonged to the widow or formed part of the testator's estate, under the following circumstances :—

On the 29th of *February*, 1852, the testator said to his wife, "*Sarah*, I am a dying man, you will want some money before my affairs are wound up." Later on the same day, a *Mr. Goold* came in and the testator told him he wanted to draw a cheque for his wife, and said to her, "Go to my drawer and in my pocket book I think you will find a blank cheque." The cheque was accordingly filled up by *Mr. Goold*, and dated the 1st of *March*. On the morning of the first of *March* the testator asked for the cheque, and having signed it, he gave it to his wife, saying, "Here, my dear, I give you this for your whole and sole use. I do not think you will live more than ten years, and it will be 100*l.* a-year, besides what the estate will produce, and upon that, I think you can live very comfortably." *Mrs. Ellis* kept the cheque in her possession till the 4th of *March*, when *Mr. Billiter* (an intimate friend of the testator) having called in, the testator told him, he wished to give *Mrs. Ellis* 1,000*l.*, and that he had drawn a cheque upon his

*April 22, 23.*

A testator, on his death-bed, gave his wife his cheque for 1,000*l.*, saying, "she would want money before his affairs were wound up, and that the gift was to be for her sole use, besides what she should receive from his estate." The cheque being crossed was exchanged some days after for a friend's cheque of the same amount, in favour of the wife. The testator stated to his friend, that he wished to give his (the friend's) cheque to her, and she received and kept it till after her husband's death. The testator's cheque was paid before

his death, but his friend's cheque, which was post-dated and also crossed, was exchanged for another, and was duly paid after the testator's death. Held, that this constituted a valid gift of the 1,000*l.* by the husband to the wife, and formed no part of the testator's estate.

Held, also, by the Lords Justices, that it constituted a good *donatio mortis causæ*.

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bankers for that amount, but that "perhaps the cheque being crossed, they would not pay the money over the counter." He then requested Mr. *Billiter* to give him a counter-cheque of the same amount, in exchange for it. Mr. *Billiter* accordingly, on the 4th of *March*, drew a cheque for 1,000*l.*, dated the 5th of *March*, payable to Mrs. *Ellis* or bearer. The "s" in the word "Mrs." was added at her instance. Mrs. *Ellis* took up the cheque drawn by Mr. *Billiter* in the view of her husband, who never saw it again. The testator died on the next day (5th of *March*), but his cheque had been paid prior to his death. Mrs. *Ellis* kept Mr. *Billiter's* cheque in her possession until after the death of her husband, and it being crossed with the words "& Co.," Mr. *Billiter*, on the 8th of *March*, gave her another cheque in lieu of it and the amount was duly paid to her.

In this state of circumstances, the question arose as to the right of Mrs. *Ellis* to retain the 1,000*l.*

Mr. *W. W. Cooper*, for the executors.

Mr. *R. Palmer*, for the residuary legatee. If this transaction can be supported at all, it must be either as a gift *inter vivos* or as a *donatio mortis causá*. It cannot be supported as the former, for the gift of the first cheque drawn by Mr. *Billiter* conveyed no interest to Mrs. *Ellis*; for though the formal words usually employed to create a gift might have been used by the testator, still as the cheque (which was a common bankers' cheque) was post-dated and without a stamp, it was, under the provisions of the stamp acts, illegal and absolutely void. It therefore created no liability and constituted no symbol of property. Besides, the money was not received by Mrs. *Ellis*, until after the testator's death, and, consequently, the gift was not complete in his lifetime.

Considered

Considered as a *donatio mortis causá*, the case completely fails. If there was a *donatio* at all, it could only be of the piece of waste paper handed to Mrs. *Ellis* in the shape of Mr. *Billiter's* cheque. The testator's cheque had been given to her, but it was afterwards taken back and given to Mr. *Billiter*, in exchange for a void cheque, and therefore, at the testator's death, Mr. *Billiter* owed 1,000*l.* to the estate. It is one of the essentials of a *donatio mortis causá*, that the thing given should remain in the possession of the donee till the testator's death. In this case, nothing but the void cheque was in Mrs. *Ellis's* possession, and, therefore, the 1,000*l.* cannot form a *donatio mortis causá*.

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It may, however, be said, that it was the intention of the testator to make a *donatio mortis causá*, but it is established, by the case of *Tate v. Hilbert* (a) and others, that property cannot be transferred by words of gift showing a mere intention, without some act, and therefore a *donatio mortis causá* cannot be supported by mere parol. The gift must be actually carried into effect, and the property must vest in the donee in the lifetime of the donor. Nor can there be a *donatio mortis causá* to one in trust for another person. This, therefore, being neither a complete gift *inter vivos* nor a *donatio mortis causá*, the 1,000*l.* must be considered as forming part of the testator's estate. He cited *Furquharson v. Cave* (b); *Miller v. Miller* (c); 1 *Roper on Legacies* (d).

Mr. *Lloyd* and Mr. *W. H. Clarke*, for Mrs. *Ellis*. This gift was made by a person in his last illness and in contemplation of death, and it was intended to be a provision for the immediate wants of his wife, after

(a) 2 *Ves. jun.* 120.

(b) 2 *Coll.* 356.

(c) 3 *P. Wms.* 356.

(d) Page 11 (4th edit.)

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his death and before his affairs could be wound up. This constitutes a valid *donatio mortis causâ*. But the fact of the wife, by the direction of the husband, giving his cheque in exchange for Mr. *Billiter's* clearly shows, that the gift was an absolute gift. It amounted to an appointment and appropriation of it in her favour. It is admitted that a cheque is only a symbol of property, and here there were both the intention to give and the act of exchange of cheques, and the property therefore passed. Even supposing Mr. *Billiter's* cheque to have been wholly void, still that could in no way invalidate the wife's right to the 1,000*l.* A cheque may be the subject of a *donatio mortis causâ*; *Lawson v. Lawson* (a); *Drury v. Smith* (b).

*The MASTER of the ROLLS.*

I think I can see my way to carry into effect the intention of the testator, without any violation of the rules of law, as regards a *donatio mortis causâ*. The testator had given a cheque for 1,000*l.* to Mr. *Billiter*. This cheque was received by Mr. *Billiter* some hours before the death of the testator, and the payment must be considered as valid. It is admitted, that the 1,000*l.* did not belong to Mr. *Billiter*, for he had given no consideration for it except his own cheque, and if no cheque had been given by him, or it had remained unpaid, he could not have retained the 1,000*l.* for his own use, but must have held it either as trustee for Mrs. *Ellis* or for the testator's general estate. If Mr. *Billiter* had paid the 1,000*l.* to Mrs. *Ellis*, could the executors of Mr. *Ellis* have maintained an action against him and compelled him to pay them that money over again? It is obvious, that

(a) 1 P. Wms. 441.

(b) 1 P. Wms. 404.

that unless he held it as a trustee for Mrs. *Ellis* he could not, though he had paid it to her, have discharged himself, by that payment, from his liability to the testator's estate, any more than if he had paid it to a stranger. It is also clear, that when Mr. *Billiter* gave the money to Mrs. *Ellis*, he believed he held it in trust for her; and I look at the rest of the transaction and the evidence to ascertain whether this was the case. The evidence satisfies me, and on this point there is no contradiction, that Mr. *Ellis*, a day or two before his death, expressed an intention to give 1,000*l.* to his wife. He stated to his clerk or partner that such was his intention, and he proceeded to carry that intention into effect, by giving her a cheque for that amount. If she had got the cheque cashed in his lifetime, it could not now be revoked, it having, until the testator's death, been considered a valid payment and good gift. She did not get it paid, but the testator delivered it to Mr. *Billiter*, stating at the time his intention to give his wife 1,000*l.* To carry the intention into effect, Mr. *Billiter* gave the testator a cheque of his own, which, being post-dated and without stamp, must be admitted to be an instrument of no validity whatever. This, as it appears to me, is fairly and properly capable of being treated in no other respect, than as an admission by Mr. *Billiter*, that he did not hold the money on his own account, and accordingly when, after the testator's death, he is asked to give another cheque, he gave it without hesitation to the person who asked for it on behalf of Mrs. *Ellis*, assuming that she was entitled to it. I must consider, therefore, that the 1,000*l.* was given to Mr. *Billiter* in the testator's lifetime in trust and for the benefit of the testator's wife, and must hold that Mrs. *Ellis* is entitled to it.

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NOTE.—The decision of the *Master of the Rolls* was affirmed on the 9th of June, 1853, by the Lords Justices, who held that the gift was a good *donatio mortis causa*.

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MASON v. CLARKE.

April 25, 26.

Where a testator gives property to a parent and his children *simpliciter*, and he has children then in *esse*, the parent and children take together, either jointly or in common; but if there be superadded words importing a settlement, the parent takes for life, with remainder to his children.

Bequest "to A." (who was *en ventre* at the time) "and her children." Held, that A. and her children took as joint tenants, and no child having survived the testator, that A. was absolutely entitled to the legacy.

THE present question depended on the will of *Benjamin Hunter*, dated the 4th of *January*, 1791, who expressed himself as follows:—Item, "I likewise give and bequeath to my daughter *Mary Webster*, wife of Captain *Thomas Webster*, the sum of 2,000*l.*, now in the 3*l.* per cent. Consolidated Annuities, and her children lawfully begotten in wedlock and born of her body."

The testator died on the 15th of *March*, 1791.

At the date of the will, *Mary Webster* was pregnant of a child, who was afterwards born alive, but died in the testator's lifetime, and she never had any other child.

Mrs. *Webster* survived her husband, and died in 1837, without issue, and the question was, to whom the 2,000*l.* consols now belonged.

In aid of the construction, a former decision of the Court upon a legacy bequeathed by the testator to another daughter was mainly relied on. It is, therefore, necessary to state the terms of that legacy, and the circumstances relating to it. The bequest was expressed as follows:—Item, "I likewise give and bequeath to my daughter, *Elizabeth Parker Hunter* the sum of 2,000*l.*, now in the 3*l.* per cent. Consolidated Annuities, and her children lawfully begotten in wedlock and born of her body. I likewise direct and order, that the interest

interest of the said 2,000*l.* be paid to *Elizabeth Parker Hunter* aforesaid, by my executors, half-yearly, for her maintenance whilst single; and after wedlock, the said 2,000*l.* to be transferred in her name, for her use and her children as aforesaid, and not to be sold out of the 3*l.* per cent. Consolidated Annuities without her free good will. And in case of *Elizabeth Parker Hunter* dying before wedlock, the said 2,000*l.* shall devolve to my daughter *Mary Webster* and her children."

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Elizabeth P. Hunter was unmarried at the testator's death, but in 1792 she intermarried with *Robert Sanderson*, and had issue one child only, viz. *Robert Hargrave Sanderson*, who died an infant in the year 1801.

Elizabeth P. Sanderson died in 1809, and in 1816, the administrator of her child, *Robert Hargrave Sanderson*, deceased, was declared entitled to the 2,000*l.* consols, so bequeathed to her and her children.

The question now was, whether the construction should be the same in *Mrs. Webster's* case, as in that of *Mrs. Sanderson*.

Mr. R. Palmer and *Mr. Hetherington*, for the next of kin of the testator. The construction must be the same as to both the legacies of 2,000*l.* consols, given to the two daughters and their children. In *Mrs. Sanderson's* case, it has been held to be a gift to her for life only, with remainder to her children, and the other gift, to *Mrs. Webster* and her children, must receive the same construction. She took for life, with remainder to her children; but as she had no child who survived the testator, the gift to her children failed, and subject to her life estate, the 2,000*l.* was undisposed of. There is, therefore, an intestacy, and the 2,000*l.* consols belong to

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to the next of kin of the testator. They cited *Vaughan v. The Marquis of Headfort* (a); *Froggatt v. Wardell* (b).

Mr. *Roupell* and Mr. *Keene*, in the same interest. Where a bequest is made to a parent and his children and there are children then living, the parent and children take as joint tenants, but if there be no children, then it is a gift to the parent for life, with remainder to his children, and the Court always endeavours to put such a construction upon a bequest as to give effect to that which is the more probable intention of the testator: *Wild's Case* (c); *Paine v. Wagner* (d). The word "children" is one of purchase, and not of limitation, except when it is necessary so to construe it, in order to give effect to a testator's expressed intention, or where a gift can take effect no other way; *Buffar v. Bradford* (e); *Stone v. Maule* (f); *Heron v. Stokes* (g); *Newman v. Nightingale* (h); *Crawford v. Trotter* (i); *Morse v. Morse* (k); *French v. French* (l); *Bain v. Lescher* (m); *Crockett v. Crockett* (n).

Mr. *Kent*, in the same interest.

Mr. *Torriano*, for the representative of the testator.

Mr. *Baily* and Mr. *E. F. Smith*, for the executors of Mrs. *Webster*. The gift of the 2,000*l.* was to *Mary Webster* and her children, simply; and there being then a child, who in contemplation of law was *in esse*, the rule is, that the parent and child, in such a case, take jointly.

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| (a) 10 <i>Sim.</i> 639. | (h) 1 <i>Cox</i> , 341. |
| (b) 3 <i>De G. & Sm.</i> 685. | (i) 4 <i>Madd.</i> 361. |
| (c) 6 <i>Rep.</i> 17. | (k) 2 <i>Sim.</i> 485. |
| (d) 12 <i>Sim.</i> 184. | (l) 11 <i>Sim.</i> 257. |
| (e) 2 <i>Atk.</i> 220. | (m) 11 <i>Sim.</i> 397. |
| (f) 2 <i>Sim.</i> 490. | (n) 2 <i>Phill.</i> 553. |
| (g) 2 <i>Dr. & War.</i> 89. | |

jointly. In all the cases cited, there was not a simple gift, but one with superadded words, showing an intention to give only a life interest to the parent, and to keep the fund undiminished for the benefit of the children. The cases of *Mrs. Webster* and *Mrs. Saunderson* differ, both as to the existence of a child at the time of the bequest in the one case, and the gift over in the other. The decision in one case, therefore, cannot govern the other.

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They cited *De Witte v. De Witte* (a); *Wild's Case* (b); *Scott v. Scott* (c); *Bustard v. Saunders* (d); *Read v. Willis* (e); *Mayer v. Townsend* (f); *Campbell v. Brownrigg* (g); *Beales v. Crisford* (h); *Woods v. Woods* (i); 2 *Rop. Leg.* (k).

Mr. R. Palmer, in reply, referred to *Edwards v. Edwards* (l).

The MASTER of the ROLLS.

The legacy of 2,000*l.*, bequeathed to *Mary Webster*, is given to her in a different manner from that in which the legacy of 2,000*l.* is given to *Elizabeth P. Hunter*. If the first legacy had been given to *Elizabeth P. Hunter* "and her children lawfully begotten," and the Court had decided that this gave her a life interest only, the decision, no doubt, would have governed this case, if the circumstances had been the same. But the circumstances materially vary. In the first place, *Elizabeth P. Hunter* was a spinster at the time the testator made his

(a) 11 *Sim.* 41.(b) 6 *Rep.* 17.(c) 15 *Sim.* 47.(d) 7 *Beav.* 92.(e) 1 *Coll.* 86.(f) 3 *Beav.* 443.(g) 1 *Phill.* 301.(h) 13 *Sim.* 592.(i) 1 *Myl. & Cr.* 401, and cases there cited.

(k) Page 1366 (4th edit.).

(l) 12 *Beav.* 97.

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his will, and therefore had no child, nor were children at that time in contemplation; whereas *Mary Webster* was not only married, but was actually pregnant, and, consequently, there was then a child actually *in esse* in contemplation of law, to whom the property might be given, and under these circumstances, the rule in *Wild's Case* might be applicable. Again, the words which follow the gift to *Elizabeth P. Hunter* show clearly, that she could not have been intended to take an absolute interest, for the testator directs "the interest of the 2,000*l.* to be paid to *E. P. Hunter*, for her maintenance, whilst single, and, after wedlock, the 2,000*l.* to be transferred in her name, for her use and her children, as aforesaid, and not to be sold out of the 3*l.* per cent. Consolidated Annuities, without her free good will." It is obvious, that the testator did not mean to dispose of it at once among them, because, on her marriage, it is to be transferred into her name, for her use and her children as aforesaid, the testator thereby constituting her a trustee of the legacy. The direction that it is not to be sold out without her free good will may also assist us in discovering the testator's intention, for it would appear, by this informally drawn will, that the testator supposed there would be some other name besides that of the daughter in which the legacy would stand, for otherwise that direction would be of no effect, and entirely inoperative. The addition of those words, "not to be sold," &c. evidently qualifies the former gift.

But if the testator intended to qualify the gift to *Mary Webster* in a similar manner, why did he not introduce qualifying words for that purpose? You cannot import into the gift to *Mary Webster* the same words as are used in that to *Elizabeth P. Hunter*, because the circumstances were not the same. The direction for her maintenance while single would have been unnecessary

cessary and unmeaning, as applied to *Mary Webster*, but it had a very distinct and obvious meaning as applied to *Elizabeth P. Hunter*.

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Now I concur in the proposition, that where a testator has used words, or a set of words, in one part of the will, it is to be assumed that the same words or the same set of words are to bear the same meaning in another part of the will; but it does not therefore follow, that because a testator has added a qualification to one gift, you are to infer that he intended to introduce the same qualification in another gift, where it has been omitted. This would not be interpreting particular words, but introducing a proviso to cut down and alter the effect of the words, which of themselves would have a definite meaning. The inference, in such a case, would rather be, that by the absence of that qualification, in a particular case, the testator did not intend so to qualify the gift.

I admit that it is not easy to reconcile all the cases upon the subject, but I think it may be said generally, that where a testator gives property to a parent and his children *simpliciter*, and there are children then in existence, the children and the parent take the property together, either as joint tenants or as tenants in common, according to the words of the will; but if there be any superadded words, which import a desire that the property should be settled, the Court will lay hold of the words, and will infer a gift to the parents for life, with remainder to the children.

Now with regard to the legacy to *Mrs. Webster*, there are no words that I can find importing any such desire for a settlement. The gift is:—"I likewise give," &c. &c. She had, at that time, one child, who in contemplation

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of law, was *in esse*, though not actually born; and there being no words importing any settlement whatever, I am of opinion, upon the construction of this will, that the legal personal representative of *Mary Webster* is entitled to the legacy of 2,000*l*.

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GOODAY v. The COLCHESTER, &c. Railway Company.

March 18.

April 20, 30.

A railway company, having applied for an act to extend their line, was opposed by a landowner; whereupon an agreement was entered into between the solicitor of the company and the landowner, that the latter should withdraw his opposition, and if the act passed, that the company should purchase his land on certain terms. Neither the appointment of agent nor the agreement was under the seal of the corporation. The act passed, but the company did not take the land. The Court, considering that the company had done no act to take the benefit of the contract, refused a decree for specific performance, and declined to order the company to admit the validity of the contract, in order to enable the Plaintiff to try his right at law.

THIS was a suit for specific performance, and came on upon bill and answer.

In 1847, the Defendants (an incorporated company) determined to apply for an act to extend their railway, and it was intended that the extension line should pass through the Plaintiff's lands. The Plaintiff opposed the bill, "and in order to induce him to withdraw his opposition, and to sell the land required," Mr. *Philbrick* (the agent and solicitor of the company) entered into negotiation with the Plaintiff, which ended in a contract, dated the 13th of *May*, 1847. This agreement was expressed to be made by the Plaintiff's agent, on the one part, and *Philbrick*, "on behalf of the *Colchester, &c. Railway Company*," on the other, and was in these terms:—
"In the event of the bill now before Parliament, for making an extension line of railway from *Sudbury* to *Melford*,

Melford, &c. &c., passing into a law, the *Colchester, &c.* Railway Company agree to purchase, and *Gooday* agrees to sell, all," &c. [*describing it,*] for 1,850*l.*, to be paid the 29th *September*, 1848, at which period possession is to be given, and the purchase is to be completed. The agreement, after providing for building a wall, proceeded as follows:—"The said *Gooday* further agrees, when required, to withdraw his dissent and to give his assent to the said bill, and to render every reasonable assistance in his power to promote the aforesaid extension railway," &c., "and to take any such steps or proceedings, for that purpose, as the said company may reasonably require."

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This agreement was signed by *Philbrick* (ostensibly, as the Defendants said), on behalf of the company; the Plaintiff withdrew his opposition, and the bill passed (a). The abstract and draft deed were sent to the company's solicitors, but nothing was done. The company neither entered upon the land, nor took any proceedings to complete the railway.

The Plaintiff, in 1850, after the compulsory powers of the company had ceased, but before the time limited for the completion of the railway had expired, filed his bill, praying a specific performance of the agreement of the 13th of *May*, 1847.

The Defendants denied that *Philbrick* was duly authorized by them to act as their agent, inasmuch as he was not authorized under the seal of the company, the only appropriate or effectual authority in that behalf."

They

(a) 10 *Vict. c. xi.* (*June 8*, 1847).

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They said, "that under the recent pressure by which railway undertakings had been affected, they were unable to enforce the requisite calls to complete the said purchases." That the agreement was not entered into under their seal, and that no authority had been given to *Philbrick* under their seal. They therefore insisted, that there was no binding contract, and they relied on the Statute of Frauds in bar of the suit.

The cause now came on to be heard.

Mr. *Roupell* and Mr. *J. H. Palmer*, for the Plaintiff. The single defence is, that the contract, not being under the seal of the company, is void. But this is the rule of the Court, that where a corporation accepts the benefit of a contract entered into on its behalf, or acquiesces in and adopts it, such contract will be held binding on the corporation. *Dr. Winne v. Bampton*(a); *Macher v. The Foundling Hospital* (b); *Maxwell v. Dulwich College* (c); *Marshall v. The Corporation of Queenborough* (d); *Wilmot v. The Corporation of Coventry* (e); *Edwards v. The Grand Junction Railway Company* (f); *The Fishmongers' Company v. Robertson* (g).

Here the Defendants have taken the benefits of the withdrawal of the Plaintiff's opposition to their bill, and they must therefore pay the price agreed to be paid for it. The contract is not conditional on the formation of the railway, and the Defendants must therefore perform their part of it, though they may not have taken the land;

(a) 3 *Atk.* 473.
 (b) 1 *Ves. & B.* 188.
 (c) Cited 7 *Sim.* 222.
 (d) 1 *Sim. & S.* 560.

(e) 1 *Y. & Coll. (Exch.)* 518.
 (f) 1 *Myl. & Cr.* 650.
 (g) 5 *Man. & Gr.* 131.

land; *Preston v. The Liverpool, &c. Railway Company* (a); *Bland v. Crowley* (b).

But if the Court should not think right to make a decree for specific performance, as in *Webb v. The Direct London and Portsmouth Railway Company* (c), it ought to put the Defendants on terms, to admit, for the purposes of an action at law, the validity of the contract, as was done in the case of Lord *James Stuart v. The London and North Western Railway Company* (d).

Mr. Lloyd and Mr. Goodeve, *contra*. The Defendants are a corporation, and the absence of their corporate seal to the contract is fatal. A corporation cannot be bound by a contract, nor can it appoint an agent for the purposes alleged, except by its common seal. There is no evidence of their having adopted or recognized the contract, nor have they received any benefit from it, for they have abstained from interfering, in any way, with the Plaintiff's land, and from acting on the agreement since the passing of the act. This distinguishes the present case from those cited. Besides this, the 97th section of the Company's Clauses Consolidation Act (e), points out the mode in which alone such contracts can be made, and that mode has not been followed. This is not a proper case for specific performance, *Hawkes v. The Eastern Counties Railway Company* (f), and the Plaintiff has in no way been damnified.

Mr. Roupell, in reply.

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(a) 1 Sim. (N. S.) 586.
(b) 6 Exch. Rep. 522.
(c) 9 Hare, 129; 1 De G. M. & G. 521.
(d) 15 Beav. 513; 1 De G.

M. & G. 735.
(e) 8 & 9 Vict. c. 16.
(f) 3 De G. & Sm. 743; 1 De G. M. & G. 737.

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The MASTER of the ROLLS.

I regret I cannot make a decree in favour of the Plaintiff, for I naturally feel desirous of giving him the amount of the damages he may have sustained. But upon the fullest consideration of the present state of the law as shown by the authorities, I think I am not at liberty to do so.

The questions in this case are, first, whether a contract has been entered into between the Plaintiff and the Defendants; and if so, secondly, whether it would be proper to grant a specific performance of that contract or leave the parties to their remedies at law; and thirdly, if, notwithstanding the contract has not been entered into between the Plaintiff and the Defendants, but between the Plaintiff and other persons, the Defendants have taken the benefit of that contract, and are bound, by equitable considerations, to perform all those obligations towards the Plaintiff, in the same manner as if they had themselves entered into the contract.

It is clear, that no direct contract has been entered into between the Plaintiff and the present company, because it did not exist at the time, and could not therefore enter into any contract; and it is not a contract with the old company, because it is neither a contract under their seal, nor one which they had the power of entering into.

It has been settled by the Lords Justices, in the recent decisions in *Webb v. The Direct London and Portsmouth Railway Company (a)*, and in *Lord James Stuart v. The London*

(a) 1 De G. M. & G. 521; but see *Hawkes v. The Eastern Counties Railway Company*, decided by Lord St. Leonards in November, 1852, subsequently to the case in the text.

London and North Western Railway Company (a), that assuming a contract to exist between the Plaintiff and the Defendants, yet, in the exercise of that discretion, which this Court possesses in matters of specific performance, it would, where nothing has been done or intended to be done and the railway has been abandoned, be productive of greater injustice to decree the specific performance of the contract, than to leave the parties to their remedies at law. I have not to consider that question in this case, unless I should be of opinion that there is a contract between the Plaintiff and the Defendants, or one by which in substance they are bound.

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The case of *Edwards v. The Grand Junction Railway Company (b)*, and the cases which have followed that decision, appear to me to establish this proposition:— that if two persons enter into a contract, one of them on behalf of a third party, and the third party subsequently acknowledges that it was entered into on his behalf, and takes the benefit of that contract, he is bound to give to the opposite party all those benefits, which he would be entitled to, if the contract had been entered into between them directly; and in substance, that he is bound specifically to perform all those stipulations in favour of the other party, contained in the contract which he has himself adopted and taken the benefit of.

The question therefore for me to consider is, whether the Defendants have adopted and obtained the benefit of the contract which has been entered into? What they have done in this matter seems to have been this:— it is not disputed that this contract was entered into on behalf

(a) 1 *De G. M. & G.* 735.

(b) 1 *Myl. & Cr.* 650.

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behalf of a corporation to be subsequently created, and which was subsequently created. Neither is it denied, that this corporation was enabled to obtain the act of incorporation by the Plaintiff's withdrawing his opposition, and which was one of the terms on which the contract was entered into; but they have done no act since, except that they have entered into various negotiations with the Plaintiff, which have resulted practically in nothing. No fresh contract has been entered into, no payment of money has been made, the land has not been taken, and though it does not directly appear in evidence that the railway has been abandoned, yet it does not appear that a single step has been taken towards its formation, or that a single acre of land has been taken for that purpose, and it is admitted, that this land in particular has not been taken. I am of opinion, that in this state of circumstances, I cannot hold that these Defendants have adopted and obtained the benefit of the contract, so as to bind them to perform all the conditions of it in favour of the Plaintiff.

The Lords Justices have determined, that even if they had entered into an express contract with the Plaintiff, it would be more equitable to leave the Plaintiff to his action for damages at law, than to compel them specifically to perform the contract, and consequently the adoption of a contract by them cannot be put higher.

Edwards v. The Grand Junction Railway Company does not apply to this case, because there the railway company having obtained all the benefit of the contract were held bound to perform their part of it, and it would be manifestly unjust to have left the Plaintiff to his action at law. I am of opinion, that the principle of *Edwards v. The Grand Junction Railway Company* (which

(which I fully approve of and which I consider has not been at all touched by those cases before the Lords Justices) does not apply to this case, where it appears that the railway has been abandoned; and the fair presumption from the evidence before the Court is, that nothing is intended to be done, the compulsory powers to purchase the land having expired and no land having been taken.

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I am of opinion, that the Defendants have not adopted the contract so as to bind them to perform it. They obtained this benefit of the withdrawal of the Plaintiff's opposition to the act of Parliament, but if they did not exercise the powers of the act, that would be a very slight advantage. If they had exercised all the powers of their act of Parliament, the expressions made use of by Lord *Cottenham* in *Edwards v. The Grand Junction Railway Company* would have applied, but that is not the case here; and though I should have been very glad, if I could have compelled the Defendants to admit a contract on which they might have been sued at law, I do not think I am at liberty to use the powers of the Court for the purpose of compelling that admission, under the threat of doing something, which otherwise I should not think myself at liberty to do. I must consequently dismiss this bill, but certainly without costs.

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DYNE v. COSTOBADIE.

April 28, 29.

A married woman was alleged to have executed an appointment in 1800, and to have destroyed it. In 1813, disputes having arisen between her and the appointees, she and her husband executed a deed of compromise, which recited the appointment of 1800, and that she had destroyed it. Held, in a contest between the appointees and a party claiming under her will, that the deed of compromise was admissible in evidence, as was also the draft bill of costs of her solicitor and a draft of the deed of 1800 found in his possession. Held, also, that this evidence (after a lapse of forty years) established the fact of her execution of the appointment in 1800.

ON the marriage of *Nicholas Woollett* with *Mary Elizabeth Fitzburgh*, articles of agreement, dated 27th *July*, 1795, were executed, whereby the property to which the latter then was or might thereafter become entitled, was agreed to be settled, upon trusts for the benefit of the intended husband and wife, and the issue of the marriage, with a general power of appointment to the intended wife, by deed or will.

There was no issue of the marriage; and it was alleged, that by deed, dated 5th *November*, 1800, Mrs. *Woollett* duly exercised the power reserved to her by the settlement, in favour of the children of Mr. *Woollett* by a former marriage. It was also alleged, that subsequently to Mr. *Woollett's* death, in 1802, she destroyed this deed of appointment. In 1808, Mrs. *Woollett* married Major *Abernethy*, and by a settlement then made, all the property of Mrs. *Woollett* was settled upon trusts for the benefit of the intended husband and wife, and the issue of the marriage, and, in default of issue, in trust for Mrs. *Woollett* absolutely.

Soon after the marriage of Major and Mrs. *Abernethy*, it transpired that the power of appointment, reserved to Mrs. *Abernethy* by the articles of 1795, had, as alleged, been exercised, and that the deed of appointment had been

been afterwards destroyed. The alleged appointees thereupon commenced proceedings to establish the validity of the appointment. A compromise was, however, effected, and a deed, dated the 7th *July*, 1813, was executed by Major and Mrs. *Abernethy* and the parties interested, whereby, after reciting the appointment and the subsequent destruction of the deed by Mrs. *Abernethy*, it was agreed, that the property should be held upon the trusts of Major and Mrs. *Abernethy's* marriage settlement, and that in the event of the death of Mrs. *Abernethy*, without issue (which happened), it should go to the children of Mr. *Woollett*, who thereby released all claim under the appointment of the 5th *November*, 1800.

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Major *Abernethy* died on the 10th of *May*, 1840, and Mrs. *Abernethy* died on the 20th of *June*, 1848, having by her will appointed *Eleanor Brutton*, a niece, her executrix and sole residuary legatee.

On the death of Mrs. *Abernethy*, a dispute arose, in respect of the property, between the appointees under the power, and the residuary legatee, and, in 1849, a bill was filed, praying a declaration as to the rights of the parties. The Court directed a reference to the Master, to inquire whether Mrs. *Abernethy* had executed any and what deed of appointment, by virtue of the power reserved to her by the deed of 1795, and, if so, to state what were its material contents, and also to inquire and state whether it had been destroyed.

The Master reported, that the draft of an indenture, purporting to be an appointment by Mrs. *Abernethy*, had been found amongst the papers of Mr. *Hinde*, the solicitor who had prepared the deed, but who was then dead, and that there had also been found a draft bill of costs

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costs of Mr. *Hinde*, for preparing the deed of appointment; and upon this evidence, together with the recital contained in the deed of compromise, he found, that the deed of appointment of the 5th *November*, 1800, existed, and that after the death of Mr. *Woollett*, it had been destroyed by Mrs. *Abernethy*. Mr. *Hinde's* draft bill of costs contained a charge for engrossing the deed of appointment, but there was no item of charge for attendance at its execution, and the draft appointment differed in some respect from the recital of it in the deed of compromise. It was also suggested, that there had been a draft settlement made in pursuance of the articles of 1795.

The residuary legatee excepted to the Master's report, and the exceptions now came on to be argued.

Mr. *Lloyd* and Mr. *Metcalf*, in support of the exceptions. In the first place, it cannot be determined, whether the power, (supposing it to have been exercised,) was well exercised, until it has been ascertained, whether the power itself was subsisting. It appears that besides the marriage articles of Mr. and Mrs. *Woollett*, there was a draft settlement, and the Court will therefore require to be satisfied as to the effect of that deed. No trace, however, is to be found of any inquiry having been made as to that settlement, and consequently, the alleged appointment, even if proved to have been duly made, may or may not be a valid exercise of the power given to Mrs. *Woollett*. In the next place, the Master, in finding that the deed of appointment existed, has proceeded upon insufficient evidence. No deed of appointment appears to have been executed pursuant to the draft produced, and the appointment as recited in the deed of compromise, differs from the draft; for, as originally prepared, in Mr. *Hinde's* handwriting,
it

it did not contain a particular clause which is now found in the recital, and as Mr. *Hinde* was Mr. *Woollett's* solicitor, and had his instructions, and as the engrossment of the deed of appointment contained this addition, the conclusion is, that Mrs. *Woollett*, finding this, refused to execute it. There is also this very special circumstance :—that the draft bill of costs contains no charge for attending on the execution of the deed, as was the case in *Skipwith v. Shirley (a)*, and execution cannot, therefore, be presumed. As to the deed of compromise, it was executed by Mrs. *Abernethy*, when under marital control, and therefore was not binding upon her; consequently, the recital contained in it of the execution and destruction of the deed of appointment cannot be used as evidence against her. It is similar to a joint answer of a husband and wife, which cannot be read as evidence against the latter, even after her husband's death.

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Mr. *R. Palmer* and Mr. *Simpson*, for the trustees.

Mr. *Glasse* and Mr. *Greene*, for the appointees, were not called on.

Mr. *Craig*, Mr. *Wickens*, Mr. *Emslie*, Mr. *W. D. Lewis*, and Mr. *Nichols*, for other parties.

The MASTER of the ROLLS.

I have to consider whether the deed of the 5th of *November*, 1800, was executed; and if so, whether it was an execution of the power contained in certain articles, dated the 27th of *July*, 1795. It is unnecessary to consider whether a settlement was executed after the marriage of Mr. and Mrs. *Abernethy*, in pursuance of these

(a) 11 Ves. 64.

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these articles, which may not have affected this very power. The Master was directed to inquire whether an appointment was executed by virtue of the power contained in the articles of the 27th of *July*, 1795, and if so, what had become of it. As to this, I find evidence to satisfy me that such a deed was prepared by a solicitor, and if that deed was executed, certain persons, who were living in 1813, acquired rights under it; and that those persons entered into a compromise with Mr. and Mrs. *Abernethy*, by a deed of the 7th of *July*, 1813, which is produced, and which, without doubt, was executed. In this deed, there is a recital, at full length, of the deed of the 5th of *November*, 1800, having been executed, and that after Mr. *Abernethy's* death, Mrs. *Abernethy* destroyed it. If Mr. *Abernethy* had not been a party to the deed of 1813, there could have been no question; and after a lapse of forty years since its execution, it would be impossible for any Court to say, that though the deed is not produced, it is not binding on her. It was however argued, that when a husband and wife do an act together, it is the act of the husband. This is illustrated by the case where a husband and wife join in an answer to a suit in this Court, where the rule has been acted upon with great strictness. Thus, where the husband and wife join in answer, the wife, though she swears positively to a fact, is not bound by such admission in any subsequent proceedings in any stage of the cause, even though the effect of it may have been to allow her, subsequently, to take advantage of the Statute of Limitations^(a), though while the suit was going on, it was difficult to affect her personally, and though the Plaintiff had no power to compel her to answer separately. On the same principle, I should be very much inclined to treat a deed
 executed

(a) See *Sanders v. Allen*, 2 *Molloy*, 329; *Hodgson v. Merest*, 9 *Price*, 563. The Vice-Chancellor *Wigram* decided to the same effect.

executed by the husband and wife in the same way. But there are two things to consider with respect to this deed; first, its legal operation and effect as respects the rights of the parties to the deed; and, secondly, its effect as matter of evidence between the parties to this suit, which is a perfectly distinct matter, and which alone is the question before me.

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If neither the wife, nor any person claiming under her were interested in the question now to be decided in this cause, and this deed of 1813 were produced, as to a matter of pedigree or other more important matter, I should not doubt, that it was evidence properly to be received. Nor should I doubt, that the solicitor's bill would be evidence of the preparation of the deed of 1800, and that the recital, that she had executed the deed of 1800, and had destroyed it, would have been evidence as between other parties. Can it then be said, that this is not evidence which ought to affect the wife or the persons claiming under her?

Possibly neither of these deeds bound the wife, and it is possible that this deed of appointment was executed under the influence of the husband; but I am of opinion, giving the greatest possible latitude to any rule of law which may arise from that presumption, that I cannot come to a conclusion which would, I think, be opposed to common sense and the rules of evidence, and hold, after a lapse of forty years, that a deed executed by her, which solemnly averred the preparation and execution of another deed and that she had destroyed it, is not evidence of its having existed. Deeds executed by a wife under marital influence are always strictly considered in this Court; but looking at the documents produced as affording judicial evidence, I cannot come to the conclusion, that the deed of the 5th of *November*,
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1800, was never executed by the married woman, or that it was not destroyed by her, as she solemnly avers it was. I am of opinion that the Master has come to a right conclusion, and the exceptions must be overruled.

## FIELD v. BROWN.

May 3.

Generally, upon the marriage of a ward of Court without leave, the marriage being found valid, and the party in contempt having executed the settlement and paid the costs, is discharged.

*A. B.* was committed for contempt for marrying a ward. After the marriage had been found valid, but before a settlement had been executed, he was discharged, upon his undertaking to abstain from any intercourse. After the settlement had been executed, the

IN this case, *Samuel Brown* had, in *June*, 1847, committed a contempt, by marrying the Plaintiff, a ward of Court, under very gross circumstances. On the 19th of *July*, 1847, an order was made, declaring him to have been guilty of a contempt of Court, and directing him to be committed to prison, and a reference was directed to the Master to inquire whether the marriage was valid, and under what circumstances and when solemnized; and, in the interim, all communication between the parties was restrained. On the 10th of *September*, 1847, the Master reported that it was a valid marriage.

*Samuel Brown*, who was still a prisoner, presented a petition to confirm the report, and that he might be discharged out of custody, on his undertaking to appear, to obey any order of the Court, which might thereafter be made, touching the marriage, or any settlement of the Plaintiff's property, and that he might be discharged from his contempt.

The

Court held, that it would be contrary to principle, either to compel the continuance of the undertaking or to make an order to the same effect.

The Plaintiff still insisting that the marriage was not binding, presented a cross petition for liberty to apply to Parliament to set it aside, and that, in the mean time, *Samuel Brown* might be detained in custody. The petitions came on before Sir *J. Wigram*, on the 8th of *December*, 1847, who ordered the papers to be laid before the Attorney-General, and the petitions to stand over.

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Sir *J. Wigram*, in the course of his judgment, expressed himself as follows:—"The case made by *Samuel Brown* is stated in a few words. His Counsel have argued for him, that a general and indefinite order for his commitment for contempt during pleasure is illegal, and that the order of the 19th *July*, 1847, being indefinite, would therefore be illegal, but that such order has a known construction in practice, namely, that it is a commitment only until he shall have executed such a settlement of the lady's property as the Court may approve of. On his part, it was argued, that to detain him one moment longer in custody was arbitrary, illegal and unconstitutional. It is certainly the first time I ever heard a proposition which thus limits the power of the Court, in cases of contempt, so broadly stated. If it be correct, it must follow, that there is no difference between cases of the most aggravated fraud, practised by the most experienced and designing knave, on the person and fortune of a ward of Court and attended with consequences of the most degrading and ruinous character to herself, and the simple case, in which a natural and innocent affection between two young persons may have led them into an indiscreet mode of doing that, which the Court, if its leave had been asked, might possibly have approved of. Indeed, if the argument be well founded, it must necessarily follow, that if the fortune of a ward of Court be so set-

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tled, that the husband could not touch it without the interference of the Court, his marriage with the ward, be the circumstances what they may, is no contempt at all."

The papers having been laid before the Attorney-General for his consideration, whether it would be proper to take any and what proceedings against the Defendant *Samuel Brown*, he directed a criminal prosecution, under the 6 & 7 Will. 4, c. 86, s. 41, for wilfully making false statements to procure the marriage. *Samuel Brown* was tried, convicted and sentenced to be imprisoned. The Plaintiff also took proceedings in the Ecclesiastical Court and before Parliament to annul the marriage, but without success.

In *August*, 1848, the matter again came before the Court, when, by arrangement, *Samuel Brown* was discharged from custody, upon his undertaking to abstain from any intercourse with the Plaintiff. The former report was then confirmed, and a reference was made to the Master to approve of a proper settlement.

A settlement was accordingly prepared and executed by *Samuel Brown*, and the cause now came on for further directions.

Mr. *R. Palmer* and Mr. *Walford*, for the Plaintiff, asked, that *Samuel Brown* might be ordered to pay the costs of the proceedings relative to his contempt, and that he should not be discharged from that contempt until payment. They also strongly urged, that as *Samuel Brown* had been discharged from custody, on the terms of his entering into the undertaking to abstain from any intercourse with the Plaintiff, such undertaking must be continued until he had been finally discharged

charged from his contempt, for if the undertaking were withdrawn, he must be remitted or considered in custody, from which he had been discharged on the faith of his undertaking. They relied on the passage in the judgment of the Vice-Chancellor *Wigram*, which is above stated.

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*The MASTER of the ROLLS* (during the argument) made the following observations:—Generally speaking, as soon as the validity of the marriage has been ascertained, and the husband has duly executed the settlement, and paid every thing, which, up to that time, he has been ordered to pay, the Court discharges him. I have never known a case yet, where, after all that has been done, the husband has been detained in prison. Can you produce a single instance, in which the Court has continued the person in prison for any period of time, definite or indefinite, after the marriage has been established, and after the husband has obeyed every order which the Court has made upon him? I never heard of such an order, and I believe none can be found.

Mr. *Lloyd* and Mr. *Shapter* appeared for the Defendants.

Mr. *Shebbeare*, for *Samuel Brown*, contended, that the settlement having been executed, the contempt was purged, and the undertaking at an end. He cited *Wortham v. Pemberton* (a), in which case, intercourse, personal or by correspondence, was interdicted, but the marriage having been found valid, that order was discharged.

Mr. *R. Palmer*, in reply, pointed out, that *Wortham v. Pemberton*

(a) 1 *De G. & Sm.* 644.

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v. *Pemberton* was not the case of the marriage of a ward of Court. He said that the undertaking being withdrawn, *Samuel Brown* must be or be considered as still in prison for his contempt, in which case, the Plaintiff would still have the protection afforded by the undertaking.

At the end of the argument,

The MASTER of the ROLLS said,—

In this case, I shall order *Samuel Brown* to pay all the costs I have already specified. With respect to compelling the undertaking to be continued, or making an order that no intercourse shall take place between the husband and wife, I am of opinion it would be contrary to every principle of law and equity, if I were to do so in this case. It could only be done on one or two grounds, both of which are perfectly untenable. One is, that I should use that as a means of enforcing the payment of costs, which he must necessarily pay before he can be relieved from his contempt. The other is, that this Court should assume a criminal jurisdiction, by acting against him *in pœnam*, and keep him in prison for some definite time, to be ordered by me, because he has been guilty of a most flagrant contempt of Court. I am of opinion, that on neither of those grounds can I interfere in this case.

With respect to the costs, I will make an order, but I am not at liberty to compel the continuance of the undertaking, or to make any order in substitution of it. He must be discharged from his contempt, on payment of the costs now ordered to be paid.

1853.

PEERS v. SNEYD.

May 3.

IN 1798, *Richard Parry*, the owner of some estates in *Wales*, by writing under his hand and seal appointed *Thomas Roberts* his attorney, "to inspect, oversee, manage and superintend" his estates and concerns in *Wales*, to receive rents, to enter and distrain, "and generally to inspect, oversee, manage and superintend the same estates, and to do any act, &c., for the "improving the same and the income thereof."

A power to a land agent to "manage and superintend estates," authorizes him, on behalf of his principal, to enter into an agreement for the usual and customary leases, according to the nature and locality of the property.

By an agreement (or take note), dated the 12th of *March*, 1827, and signed by *Roberts*, he on the part of *Mr. Parry*, agreed to permit *Edward Edwards* and others to search for copper and lead ore on a part of the property, and to grant him a lease of the mine for one and twenty years, from the 22nd of *November*, 1829.

When a vendor succeeds in a suit for specific performance, he is entitled to costs, notwithstanding the title was first shown in the Master's Office, if the suit was occasioned solely by the conduct of the Defendant.

Mr. Parry died on the 23rd of *July*, 1828, without having granted any lease. He devised his estates to trustees, but gave them no leasing powers.

Interest on arrears of rent and an apportionment, as between landlord and tenant, disallowed.

On the 8th of *November*, 1838, the trustees granted the lease for twenty-one years in pursuance of the agreement.

In *July*, 1843, the Defendant agreed to purchase the lease and pay an annual rent of 400*l.*, payable quarterly. The Defendant entered, but having abandoned the mine and refused to complete, the Plaintiff, in *February*, 1848, filed this bill for a specific performance.

By

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By the decree, in 1850, it was referred to the Master to inquire whether a good title could be shown to the lease, and when it was first shown; and if the Master should find that such title was not shown before the filing of the bill, he was to state under what circumstances it was not shown.

The Master reported in favour of the title, and that it was first shown in his office, on the 5th of *August*, 1852.

There was evidence of the practice, in the neighbourhood of the agent, to sign "take notes" for granting leases for twenty-one years, that *Roberts* had been in the habit of so acting, and that his acts had been recognized by *Parry*.

The Defendant excepted to the Master's report, on the ground "that the lease of the 8th of *November*, 1838, was granted in pursuance of the agreement of the 12th of *March*, 1827, made between *Thomas Roberts* (agent to *Richard Parry*), of the one part, and *Edward Edwards* and others, of the other part, but that it did not appear, that *Thomas Roberts* was ever authorized or empowered to enter into any agreement to grant a lease for twenty-one years; and it appeared, that the lessors in the lease (who were devisees named in the last will of *Richard Parry*) were not authorized or empowered to grant such a lease, unless the said agreement so entered into by *Thomas Roberts* was a binding agreement and such as could be enforced against the devisees of *Richard Parry*.

Mr. *R. Palmer* and Mr. *Beavan*, in support of the exceptions, argued, that the document of 1798 gave no authority to *Roberts* to enter into a contract for a lease;

lease (a); that he was a mere bailiff, and, as such, could not make leases for years, for his business was only to collect the rents, &c.; 4 *Bacon's Abr.* (b). That it required a special authority to grant leases of mines for twenty-one years; *Paley on Principal and Agent* (c); and that the evidence was wholly unsatisfactory.

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Mr. Lloyd and Mr. Amphlett, for the Plaintiff.

The MASTER of the ROLLS.

I am of opinion that the Master has come to a right conclusion in this case. I think the deed, upon which, with the evidence, the matter turns, in this case, is to this effect:—it empowers *Roberts* to manage the property for Mr. *Parry*, which means that he shall have all the powers which are necessary for managing the property, according to the manner in which that property has been managed or ought to be managed. I am, therefore, of opinion, that, although it does not give him a power to grant leases for ninety-nine years of agricultural land, yet if it had so happened that this related to property in the neighbourhood of a town, I think it would have authorized an agreement to grant leases for that term, if that had been the general custom and the mode of letting in the neighbourhood. If the custom had been to let mines by what are called “take notes,” by which persons take them for three years, with an option of taking a lease for twenty-one years, I think the

(a) The agent's authority need not be in writing: *Emmerson v. Heelis*, 2 *Taunt.* 46; *Clinan v. Cooke*, 1 *Sch. & Lef.* 31; *Coles v. Trecothick*, 9 *Ves.* 250; and the subsequent ratification is sufficient: *Maclean v. Dunn*, 4 *Bing.* 722; *Gosbell v. Archer*, 2 *Ad. & E.* 507.

(b) Page 782 (7th ed.)

(c) Page 189 (3rd ed.)

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the deed would extend to that, and the evidence shows that such was the custom of letting mines in this country, and agreements of a similar description seem to have been entered into by *Thomas Roberts* with other persons. I think, under these circumstances, that this was such an agreement as *Mr. Parry* himself could not have disputed.

The cause came on for further directions.

The Master had found, that the title was not shown before the filing of the bill, under the following circumstances :—That in *July* or *August*, 1843, soon after the agreement for purchase, the Defendant entered into possession of the mine and premises, and commenced working and getting ore and minerals therefrom, and continued such working until the month of *June*, 1845; and that in the month of *December*, 1843, at the request of *John Sneyd* a copy of the lease of the 8th *November*, 1838, was sent to him, and he duly acknowledged its receipt, and that he paid the Plaintiff the yearly rent of 100*l.* up to the 29th of *September*, 1847. That he never applied to the Plaintiff for an abstract of his title to the lease, nor complained of the want of such abstract, prior to the filing of the bill, but that on the 20th *December*, 1847, he served the Plaintiff with notice of abandonment of the contract, on the ground that the Plaintiff had not power specifically to perform the contract.

Mr. R. Palmer and *Mr. Beavan* contended, that as the title had been first made out in the Master's office,
the

the Plaintiff, the vendor, ought to pay the costs of suit ;
Wilkinson v. Hartley (a), where the Court said this rule
 ought to be kept as strict as possible.

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The MASTER of the ROLLS.

I abide by the opinion I before expressed, that the rule ought to be adhered to strictly, where there are no special circumstances to induce the Court to make an exception to it. My duty now is, to carry out the decree made in this case at the original hearing. It is clear, that the Vice-Chancellor considered, that the ordinary rule might not be applicable to this case, if from any circumstances appeared why the title was not shown before the filing of the bill. Accordingly, a special reference to the Master was made upon that subject. The Master, in his report, has stated circumstances which satisfy me, that no statement or showing of title would have induced the Defendant to take this lease and pay what was due under it; that in fact, he simply disputed the authority of the Plaintiff to grant this lease and never asked for the title of the lessor to the original lease. I think that the circumstances show, that the suit has been occasioned solely by the conduct of Defendant, and he must, therefore, pay the ordinary costs of it.

The term having expired, the Defendant was directed to pay the amount of rent, but as he had not paid any rent from *September*, 1847, the Plaintiff asked for interest.

The MASTER of the ROLLS held he was not entitled thereto.

Under

(a) 15 *Beav.* 183.

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Under the agreement of 1843, the rent was payable quarterly, in *March, June, September* and *December*, but the original lease ceased on the 23rd of *November*, 1850; and the question was raised, whether the Plaintiff was entitled to an apportionment of the rent from the last quarterly day of payment (29th of *September*, 1850) to the expiration the lease (23rd of *November*, 1850).

The MASTER of the ROLLS, however, held, that he was not: the case not coming within the apportionment acts (a).

(a) 11 *Geo.* 2, c. 19, s. 15; 4 & 5 *Will.* 4, c. 22; and see 12 *Bear.* 317, n.

WILLIAMS v. WILLIAMS.

May 4.

A motion for a decree, under the 15 & 16 *Vict.* c. 86, s. 15, is a proceeding within the meaning of the 40th section of the same act, and therefore, for the purpose of such a motion, the Defendant may cross-examine the Plaintiff.

THE Plaintiff, under the 15th section of the 15 & 16 *Vict.* c. 86, served the Defendant with notice of motion for a decree, and filed affidavits in support of the motion. The Defendant filed affidavits in opposition, to which the Plaintiff filed an affidavit in reply. In this state of the proceedings, the Defendant, under the provisions of the 15 & 16 *Vict.* c. 80, s. 30, applied for and obtained a summons from the chief clerk at chambers, for the appointment of a Barrister at *Liverpool*, where the Plaintiff resided, as an examiner, to take the cross-examination of the Plaintiff. The Plaintiff objected, that there existed no authority, either under the 15 & 16 *Vict.* c. 86, or the General Order of the 7th of *August*, 1852, for making such an order; and a motion was made to stay proceedings under the order, for the purpose of obtaining the opinion of the Court upon the question.

Mr.

Mr. *Shebbeare*, in support of the motion, referred to the 15th section of the 15 & 16 *Vict.* c. 86, and contended, that it applied only to affidavits, and did not authorize the examination of a witness before an examiner. That by the 21st section, commissions to take examinations had been abolished, and that the General Orders of the 7th of *August*, 1852 (*a*), which were issued immediately after the passing of the act, regulated the mode of taking evidence on motions for a decree and dealt with affidavits only; and that by the 26th Order (*b*), no further evidence, on either side (that is, after the affidavits are filed,) is to be used upon such motion for a decree or decretal order, without the leave of the Court. That the 38th section of the act applied only to causes in which issue had been joined, and the 31st (*c*) and following Orders of the 7th of *August*, 1852, fixed the time and mode of taking the evidence. Under those circumstances, he contended, that the proper course for the Defendant to take, in this case, if he required the examination of the Plaintiff, would have been to file interrogatories under the 19th section of the act; that the mode of proceeding which he had adopted was neither authorized by the act or the general orders; and that, consequently, the order in question was irregular, and the proceedings under it ought to be stayed.

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WILLIAMS.

The MASTER of the ROLLS.

The 40th section of the act, which provides, "that any party may require the attendance of any witness before an examiner of the Court, or an examiner specially appointed for the purpose, and examine such witness orally,

(a) *Ord. Can.* 461.(b) *Ib.* 468.(c) *Ib.* 469.

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orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceedings before the Court, and any party having made an affidavit to be used, or which shall be used on any claim, motion, petition, or other proceedings before the Court, shall be bound to attend before an examiner, for the purpose of being cross-examined," is very general in its terms, and applies to every possible case that can arise, and undoubtedly authorizes the making of the order complained of. All that the Court by the General Orders has done, is to prescribe the time within which an affidavit is to be made. Moreover, it is but reasonable, that the clause in the act should comprehend motions for a decree, as well as all other motions; and such an interpretation does no violence to the words of the clause, which are of a very general character; for it is the obvious sense and meaning of them, that the parties should be at liberty to obtain such an order as that complained of. The other sections of the act and General Orders, which have been referred to, do not, in my opinion, in any way affect or limit the power given by the 40th section of the act.

WEDDERBURN v. WEDDERBURN.

May 5.

Co-Plaintiffs must act together, and cannot take inconsistent proceedings.

One of several co-Plaintiffs moved for liberty to take a state of facts into the Master's office, and proceed thereon apart from the rest. The motion was refused with costs.

GEORGE HAWKINS and his wife were co-Plaintiffs in this suit, in conjunction with three other persons. In 1836, a decree was made for taking the accounts, but they had not been completed. There were bills of revivor, in which the same persons were co-Plaintiffs, with four others.

Mr.

Mr. *Hawkins*, in person, now moved, "That, in consequence of Messrs. *Roy & Co.*, the Plaintiff's solicitors in this cause, or others the solicitors who are legally on the record, having refused to proceed further in the cause, I, *George Hawkins* and *Mary* my wife, may be at liberty to bring in before the Master *Tinney*, to whom these causes stand referred, a state of facts and charge, and such evidence in support thereof, as we may be advised, to carry out so much of the decree, made in the hearing of such causes, as directed the Master to take an account of the personal estate of *David Webster*, deceased, the testator in the pleadings mentioned."

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This application was supported by the affidavits of Mr. *Hawkins*, stating, that the proceedings in the Master's office had not been conducted to his satisfaction; that no proceedings had been taken since the 26th of *March*, 1851, and that Messrs. *Roy & Co.* had refused either to proceed themselves, or to allow any other solicitor to proceed in the Plaintiffs' cause.

Mr. *Cole*, for the other Plaintiffs.

Mr. *R. Palmer* and Mr. *Cotton*, for the Defendants, were not heard.

The MASTER of the ROLLS.

Mr. and Mrs. *Hawkins* may, in concurrence with the other four co-Plaintiffs, remove their solicitor, and the other four may allow him to conduct the proceedings for all. But if the Plaintiffs do not all concur, Mr. *Hawkins* cannot take a course of proceeding different and apart from the other Plaintiffs, for the consequence would be, that their proceedings might be totally

1853.  totally inconsistent. When persons undertake the prosecution of a suit, they must make up their minds whether they will become co-Plaintiffs; for if they do, **WEDDERBURN** v. **WEDDERBURN.** they must act together. I cannot allow one of several Plaintiffs to act separately from and inconsistently with the others.

Refuse the motion, with costs.

February 26.

March 11.

April 20.

May 3, 4, 7.

WEDDALL v. NIXON.

A testator, in 1836, devised all his real estate to his wife, and appointed her executrix. He afterwards purchased an advowson and died. The widow proved this will, and sold the advowson. An objection being made that the after-purchased property did not

THE testator, Mr. *Weddall*, by his will, dated the 28th *September*, 1836, devised and bequeathed all his real and personal estate to his wife *Louisa M. Weddall*, absolutely, and appointed her sole executrix. Afterwards, on the 13th *December*, 1845, the testator purchased the advowson of the vicarage of *Sutton*, and he died in 1851. Mrs. *Weddall*, the sole executrix, proved the will shortly afterwards.

On the 7th of *February*, 1852, Mrs. *Weddall* contracted to sell the advowson to Mr. *Nixon* for 2,500*l.*

The

pass, a search was made, and another testamentary instrument of 1847 was found, purporting to confirm a will of 1836. Held, that the purchaser was entitled to the same amount of proof of the codicil of 1847 as would be necessary to establish it against the heir, and that it ought to be proved in the Ecclesiastical Court.

On the sale of an advowson, the purchase-money was to be paid on a fixed day and the conveyance to be executed, but, in default of payment, the purchaser was to pay interest. The purchase was not completed, through the default of the vendor. Held, that no interest was payable.

A purchaser having unsuccessfully insisted, that an instrument of republication did not sufficiently refer to the will, so as to identify it, no costs were given on either side on a bill for specific performance by vendor, who had not made out his title.

The abstract being delivered on the 10th of *February*, 1852, it was objected, that the advowson having been acquired after the date of the will, did not pass thereby, unless it could be shown that the will had been republished after the testator became seised, and of which there was no evidence.

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Mrs. *Weddall* thereupon searched among certain private papers of the testator, which up to that time she had believed to relate solely to domestic matters, and discovered an instrument of republication of his will, in the following words:

"I hereby ratify and confirm all the contents of my will, dated one thousand eight hundred and thirty-six.


"*W. L. Weddall,*
"*Kensington, March, 1847.*

"Signed and sealed by me in the presence of
"*Catherine Susanna Smear,*
"*Ellen Maria Dawner,*
"*Georgiana Smith."*

The abstract was amended by inserting this instrument, and the purchaser's solicitor was furnished with a copy, and a statutory declaration made by the attesting witnesses to the instrument as to the due execution thereof.

The objection to the republication being persisted in, Mrs. *Weddell* filed her bill for specific performance.

The Defendants submitted, by their answer, that there was nothing to connect the second instrument with the first, or to show that it did not refer to some other testamentary papers; that the title was therefore too doubtful

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ful to be safely accepted, without the concurrence of the testator's heir at law. They admitted that the sole ground of refusal by Mr. *Nixon* to complete the purchase was, that the instrument of republication was not and did not operate as a republication of the will, but, that with this exception, the title, on the 24th *March*, 1852, was unobjectionable.

No evidence was gone into on either side.

Mr. *Lloyd* and Mr. *Babington*, for the Plaintiff. The testator, at the time he executed the instrument of republication, either had not the will by him, or did not take the trouble to refer to it, relying on his recollection of its contents. He remembered that the will he intended to ratify was dated in 1836, and he has thereby, in 1847, identified that will of 1836. Although the second testamentary instrument has not been proved in the Ecclesiastical Court, yet the ordinary proof has been furnished the purchaser. Proof of that instrument in the Ecclesiastical Court would be of no value, so far as it relates to real estate, for that Court has no jurisdiction over such matters. It might have been admitted to probate as to personal estate, and would have made the will speak as from the month of *March*, 1847, but that would have been an unnecessary proceeding, inasmuch as the will of 1836, so far as it related to personal estate, would by itself refer to the personal estate as it existed at the testator's death. As a mere instrument of republication, probate of it was altogether unnecessary, as regarded the real estate; *Habergham v. Vincent* (a); and therefore it can be no objection to the title to real estate that it has not been proved. No determination
of


(a) 2 *Ves. jun.* 209.

of the Ecclesiastical Court would, in any respect, oust the jurisdiction of this Court, or affect its judgment, when it came to determine what real estate had been devised. The document itself, therefore, and the statutory declaration of the witnesses, gave the purchaser all that he required.

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It is very difficult to understand the nature of the purchaser's objection. The instrument may be less formal than such instruments usually are, but that does not destroy its character of being a republication of the will of 1836; and the only question then is, whether the testator sufficiently identifies the will he intends to ratify and confirm, by his reference to it in this document of *March*, 1847. The will is dated the 28th of *September*, 1836, and he refers to it as "his will, dated in 1836." If the will of the 28th of *September*, 1836, had been followed by another testamentary instrument of a subsequent date, the instrument of the 28th of *September*, 1836, could not properly be called his *last will*; but it is manifest that there was no subsequent instrument, since the Ecclesiastical Court has admitted to probate the instrument of the 28th *September*, 1836, as the *last will*, excluding thereby the possible inference of there being a will executed by the testator subsequently to that date. If any will had been made anterior to 1836, that of 1836 would supersede and revoke it, and any testamentary instrument subsequent to 1836 would be revoked by that of 1847, which restored and set up the will of 1836. What the testator here refers to is therefore made out in the most satisfactory way, by the process of exhaustion, to be the will of the 28th *September*, 1836, and none other. In all questions of execution or attestation of a will of real estate, Conveyancers, before the late Wills Act, could place no reliance upon the probate of it in the Ecclesiastical Court.

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Again, it may be said that this instrument has not been proved in this cause, in the manner in which it would have been, in order to establish it against the heir, i. e. by proving the sanity and competency of the testator, and its due execution and attestation. This has not been done, because the document is not in issue in this cause, which comes before the Court on bill and answer, and because no claim is made to have the will established against the heir; the only issue tendered is, whether the instrument of republication sufficiently identified the will intended to be ratified and confirmed. Lastly, it will be said that the circumstances of the case are such as to suggest suspicion as to the title, but by the case of *M'Queen v. Farquhar* (a), if not before, it was established, that you cannot, upon any vague, indefinite suspicion, successfully object to a title, and refuse to perform the contract. Nothing less than some distinct fact, which corrupts the title, can justify a purchaser in rescinding the contract. None such exists in this case, and therefore the Plaintiff is entitled to a decree for specific performance. They cited *Roguers v. Pittis* (b); and 1 *Jarman on Wills* (c).

The MASTER of the ROLLS.

I will not compel a purchaser to take this title, with less satisfactory evidence than I should require if it were necessary to establish a will of real estate in this Court. I cannot establish the will, in this case, because the heir is not now before the Court. Subject to that, I will hear the Defendants.

Mr. *R. Palmer* and Mr. *Kirkmann*, for the Defendants.
 The

(a) 11 *Ves.* 467. (b) 1 *Add. Ecc. Rep.* 30. (c) Page 171.

The second instrument relates as much to personal as to real estate, and it was the duty of the Plaintiff to propound it for probate, if she had been aware of its existence. It might have an important influence upon the construction of the will. The circumstances of the case too are such as to cause great suspicion, in consequence of the absence of probate of this document, and because it was first produced just when it became necessary to cure an objection raised to the title. There is also a great want of accuracy in not inserting the precise date of the will in a document intended to republish it. The Court, it is true, does not generally act upon suspicion, but Lord *Cottenham* did so in *Grove v. Bastard* (a). As to the identification, the document in question does not refer to the will intended to be republished by any precise date, but to the general date of 1836; there might have been some other will subsequently executed in 1836, and the probate in the Ecclesiastical Court, of that of the 28th of *September*, is by no means conclusive as to the contrary. The question is, whether, as against that possibility, the purchaser is sufficiently protected, by mere presumption and inference, that the same document proved in the Ecclesiastical Court might be the document referred to in the second instrument.

The MASTER of the ROLLS.

I think I must consider that this testamentary instrument of 1847 does refer to the will of 1836, which latter has been proved so far as regards the personal estate. I am bound so to consider it, but I am not satisfied with the degree of proof of the second testamentary instrument, and

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(a) 2 *Phill.* 619.

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and, if the purchaser requires it, he is entitled to have it proved, exactly in the same way as I should require a will to be proved when I was about to establish it against the heir; not that I propose to establish it against the heir, or to require the vendor to do so. In such a case, the testator's competency must be proved, and if it be thought necessary, an opportunity for the cross-examination of the witnesses must be given. Let the case stand over, with liberty to the vendor to adduce such further evidence as she may be advised; and if sufficient evidence be given, there must then be a decree for specific performance.

April 20. The MASTER of the ROLLS.

I have been thinking over this case since it was last before the Court, the point appearing to me to be new. It has occurred to me, that as no person can prove a will in the Prerogative Court, without declaring, upon oath, that he brings in every testamentary paper, it follows, that if, after probate, a testamentary paper be discovered, it is the duty of the person making that oath to bring in that paper. Though the statement on oath was believed to be perfectly true at the time, yet if testamentary papers are afterwards found, they ought to be produced, whatever may be their character. This second testamentary paper not only affects the real estate, but it also republishes the will of 1836, so that its effect would be this:—that if, between 1836 and 1847, there had been a testamentary paper revoking the will of 1836, this codicil of 1847 would set it up again.

In that state of circumstances, therefore, I think that this being a duty imposed on the legal personal representative

representative, I ought not to decree specific performance until that document has been propounded in the Ecclesiastical Court.

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Probata of the second testamentary instrument was obtained and the title was accepted. May 3, 4.

The case now came before the Court on the question of interest on the purchase money and as to the costs of suit.

This depended on the terms of the contract. By this, the Plaintiff, *Mrs. Weddall*, agreed to sell the advowson to *Nixon*, at or for the price or sum of 2,500*l.*, to be paid by *Nixon* to *Weddall*, on the 10th day of *March*, 1852; at which time, upon payment of this sum of 2,500*l.* *Mrs. Weddall* and all other necessary parties, if any, were to execute a conveyance to *Nixon* of the advowson and premises; but in case of default in payment thereof, as aforesaid, the purchaser was to pay to the vendor interest upon the purchase money, at the rate of 4*l.* per cent. per annum.

Mr. Lloyd and *Mr. Babington*, for the Plaintiff. The subject matter of the agreement is an advowson, and the incumbent being seventy-nine years of age, its value is increased by every day's delay in completing the contract. The Defendant, who derives the benefit of the delay, is in the same situation as if he had taken possession of property yielding rents and profits. The purchaser is not entitled both to the improved value and the benefit of the retainer of the purchase money. He ought, therefore, to be charged with interest from the 10th of *March*, 1852, the day on which the purchase

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chase ought, according to the contract, to have been completed. On the 24th of *March* the abstract was perfected ; and although this second document had not, at the filing of the bill, been proved, yet the Defendant's objection was not founded on the absence of that proof, nor was any such requisition ever made. The only issue tendered by the answer is, that there is nothing whatever to connect the alleged instrument of republication with the will as proved, or to show that it did not refer to some other testamentary instrument or disposition by the testator. And the answer, in another place, states that to be the only ground of refusal to complete the purchase, and, except as to that objection, that the title was unobjectionable on the 24th of *March*, 1852. The title, therefore, having been shown, the Plaintiff is entitled to interest. The rule on the subject of interest on purchase money is clearly laid down by Lord *St. Leonards*, in *Vend. and Purch.*(a), and is supported by the authorities there referred to. Equity considers that which is agreed to be done actually performed, and the purchaser is entitled, from the time fixed for completing the contract, to the profit of the estate, whether he enters into possession of it or not, and the vendor is entitled, from the same time, to interest on the purchase money, if not then paid ; and the same rule applies to the sale of a reversion. Interest must be paid on the purchase money, because the wearing of the lives is equivalent to taking the profit. In *Champervorne v. Brooke* (b) it was argued, that the appellant could not be called on to pay interest, where the other party was in fault, but Lord *Brougham* said it was not a question as to the fault of either party. The thing contracted for had increased in value, and the purchaser would
 get

(a) *Ch.* 16, s. 1.

(b) 3 *Cl. & Fin.* 16.

get an advantage by that increase and ought to pay for it, as he would come into possession of a more valuable property; and Lord *Lyndhurst* observed, that the Appellant had lost sight of the fact, that the money was in his pocket all the time, and he had been making interest of it.

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In a certain sense indeed an advowson cannot be called a reversion, yet it has the character of a reversionary interest, which entitles it to come under the same principle, for the most valuable part of it is the next presentation. Interest is therefore payable, the default in payment intended by the contract not being a default in payment at the day fixed if a good title not be shown, but a default in payment or omission to pay from any cause whatever. *De Visme v. De Visme*(a) was a case in which the estate was yielding rents and profits, but the present case is distinguishable, here there are no rents and profits. The vendor could not have presented his nominee, in case of a vacancy pending this litigation, and might have been restrained from presenting any one but the purchaser's nominee. The Plaintiff could, therefore, reap no benefit from the delay that has happened.

As to the costs, the principle is, that where the suit has been occasioned by an objection taken by the purchaser, which he is unable to sustain, he must pay the costs of the litigation, though different objections may spring up in the course of the suit, which the vendor, if asked, would have been perfectly willing to remove without suit. They cited *Long v. Collier* (b); *Scoones v. Morrell* (c).

The

(a) 1 *Macn. & G.* 336; 1
Hall & Tw. 408.

(b) 4 *Russ.* 267.
(c) 1 *Beav.* 251.

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On the question of interest, I am of opinion, on the construction of the contract, that the interest was to run merely from the time where default was made by the purchaser in payment of the money on a good title being shown, and therefore no interest is in this case payable. As to the costs, I will hear the Defendants.

Mr. *R. Palmer* and Mr. *Kirkmann*. It is the duty of a vendor to clear up every objection before the purchaser is bound to accept the title, and there is no distinction to be taken between what is necessary for the authentication of the instruments which are essential to the title and the production of those instruments themselves. If such instruments authenticate themselves *cadit quæstio*; if not, that which is necessary ought to be supplied. The Court has decided that a good title could not be made until the second instrument had been proved, and that has been done pending the suit. The peculiar circumstances of the case threw a cloud over the title, which the Defendant had a right to require to be removed before he completed his purchase. He is therefore entitled to his costs.

Mr. *Lloyd*, in reply.

May 7.

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I have read the pleadings in this case and I intend to make a decree without costs on either side. I am of opinion that a good title was not in fact shown, till after the suit was instituted; for the production of a will, unauthenticated, cannot be said to be equivalent to the production

duction of a document which authenticates itself. If it had rested there alone, I should have given the Defendants the costs of the suit; but I think the Defendants have occasioned a great portion of this suit, by insisting on a point, which, in my opinion, was untenable, relating to the construction of the document itself. By that objection, a considerable portion of the expense of this suit has been occasioned. I have come to the conclusion that the proper mode of dealing with this case is, to make a decree without costs on either side.

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LORD v. PURCHASE.

THE testator, who died in 1843, specifically bequeathed his leasehold house, in *Lower Grosvenor Place*, and his leasehold ground rent payable out of a house in *Great Stanhope Street*, and he appointed the Defendant his executor. The Defendant proved the will, and for eight years received the rents, amounting to 503*l.*, which he retained.

May 24.

An executor, for some years, received the rents of property specifically bequeathed. The specific legatee having instituted a suit against him, held, that he could not set up the adverse title of a third party as a defence to a motion to pay the amount into Court. Held also, that the executor was not entitled to deduct the amount of

The Plaintiff being entitled to the house and rents, as representative of the specific legatees, instituted this suit against the executor to recover them. The Defendant, in his answer, set up, that the property was derived under the will of the testator's father, and that it was very doubtful whether the testator was entitled thereto,

debts, &c. paid by him, there having, apparently, been sufficient *general assets* out of which they ought to have been paid.

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thereto or to bequeath the same. He stated, that the tenants had, for three years, refused to pay the rent to him or any other person.

Mr. *James Anderson* and Mr. *G. W. Collins*, moved for payment of the 503*l.* into Court, and for a receiver. They argued that a trustee could not set up an adverse title against his *cestui que trust*, and they cited *Daniel's Practice* (a), as to the right to a receiver.

Mr. *Roupell* and Mr. *Busk*, for the Defendant, argued, that the property was vested in the legal personal representatives of the testator's father, and not in the Defendant ; and that the Plaintiff had not made out his right thereto, so as to entitle him to require the fund to be brought into Court, or to have a receiver. They also argued, that as it appeared from the answer, that the Defendant had expended 40*l.* for legacy duty, in respect of this property, and 270*l.* for debts, funeral and testamentary expenses, the amounts ought to be deducted from the 503*l.*

The MASTER of the ROLLS.

This is an application in a suit by the specific legatee against the executor for the payment into Court of the sum admitted to have been received for the rents of the property specifically bequeathed. The first objection is, that his testator had no power to dispose of the property. The Defendant however has, as executor, received the rents of property, to which the Plaintiff is entitled, if the testator had any power to dispose of it. The title under which he has received the rent

(a) Page 1588, 2nd edit.

rent is the common title of the executor and the legatee, and I cannot allow an executor to raise such an objection at this stage of the cause. It is clearly for the interest of everybody, that the property should be protected, and it does not lie in the mouth of the executor to take this objection. He may raise it at the hearing, when the Court is called on to dispose of the property, but not now, when it is a question of its protection. So far, therefore, as this objection is concerned, he must pay the money into Court. *

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What is he to deduct? According to the statement, there were general assets out of which the debts ought, in the first instance, to have been paid, and the specific bequests ought not to have been applied for that purpose. It is not enough for an executor to say, "I have paid these sums;" the Court inquires if they have been properly paid, and directs the payment of a fund into Court for the purpose of protecting it for the person ultimately entitled. As to the 40*l.* legacy duty, it was properly payable out of the specific legacy and ought to be deducted out of it; but as to the other payments, there appears to be a solvent estate, with sufficient general assets to pay all the debts. The executor has been in possession of the property eight years, and has received 503*l.* from the rents. The specific legatee asks to have this sum preserved until the hearing of the cause. I am of opinion, that he is entitled to have this sum paid into Court, and to have a receiver appointed. The executor may deduct the 40*l.* legacy duty, and all payments made in respect of this particular property, but no others.

1853.

AINSLIE v. SIMS.

May 25.

When a demurrer has been overruled, and an appeal from the order is pending, an *ex parte* order to amend is irregular; and a Plaintiff having obtained such an order, after he had notice that the appeal had been set down, it was discharged with costs, and the amendments were expunged.

ON the 25th of *April*, 1853, a general demurrer to the bill was overruled. On the 11th of *May*, the Defendant presented a petition of appeal against the order, which was answered on the 12th, and on the 13th a copy of the petition was served on the Plaintiff's solicitor. On the 14th, the order on the petition was drawn up, and the appeal set down for hearing; and on the evening of the same day the order was served on the Plaintiff's solicitor.

On the same day (the 14th of *May*), the Plaintiff, without stating the fact of the pending appeal, presented a petition for the common order to amend without costs. The order was accordingly made, but was not served until the 18th. On the 19th, the Plaintiff amended his bill on the points discussed on the demurrer; and on the 20th he filed it, and served a copy of the amended bill on the Defendant's solicitor.

The Defendant now moved to discharge the order to amend for irregularity, to expunge the amendments actually made, and to take the amended bill off the file; or that the Plaintiff might pay the Defendant's costs of the hearing of the demurrer, and of the proceedings on the appeal, which had not then been heard.

Mr. *R. Palmer* and Mr. *G. L. Russell*, in support of the motion. If the Plaintiff had a right to obtain such an order pending the appeal, it would be useless for the Defendant to appeal at all, for the record to which it

it related would not be in existence when the appeal came on to be heard. In effect, the Defendant would then be deprived of his right to take the opinion of the Court of Appeal, and, assuming him to be right, be unable to recover back the costs of the demurrer, paid by him under the order of the 25th of *April*. Besides, the Plaintiff, when he applied for the order, suppressed the fact of the demurrer having been allowed; whereas, if he had stated it to the Secretary, the order would have been refused. The very point arose in *Lewis v. Cooper* (a), in which case the Plaintiff obtained an order of course to dismiss his bill, suppressing the fact of the allowance of the demurrer, and it was discharged for irregularity. In that case, it does not appear that notice of the appeal had been served on the Plaintiff. The present is therefore a stronger case than *Lewis v. Cooper*. In *Price v. Webb* (b) it was held, that an order for leave to amend operates from the time of service only, and that any step taken by the Defendant, after the order is made and before it is served, is regular. Here, the appeal was set down for hearing, and the order served on the Defendant, before the service of the order to amend, and it, therefore, has priority.

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Mr. Roupell and Mr. Martindale, for the Plaintiff. The order of course was perfectly regular before answer, 64th Order, of 8th May, 1845 (c). *Lewis v. Cooper* does not apply to the present case: there, the Plaintiff dismissed his bill, and therefore the cause was at an end; but here, the suit is continued, and an appeal does not stop the progress of a cause, unless an order be made to that effect. The Defendants have mistaken their course;

(a) 10 Beav. 32; 2 Phillips,
178.

(b) 2 Hare, 515.
(c) Ord. Can. 308.

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course; they ought to have applied to the Court immediately after notice of the order to amend, to stay proceedings under it pending the appeal, but not having done so at the time, it is now too late; *Wellesley v. Wellesley (a)*. The Defendants had been informed, as early as the 9th of *May*, that the Plaintiff intended to amend, and therefore if any inconvenience has been sustained by him it was his own fault, and was occasioned by his own delay. As to the costs, the motion clearly asks too much, for a fixed sum only is payable in the case of a demurrer, namely, 5*l*.

The MASTER of the ROLLS.

I have no doubt that the order obtained by the Plaintiff was irregular, and must be discharged. *Lewis v. Cooper* is strictly applicable to the present case, and is not so strong. The rule in such cases is, that where a party applies for an order of course, he must state to the officer every circumstance that has occurred, which may, by possibility, take away the jurisdiction to grant an order of course. Here, he would not have granted this order, if what had occurred had been stated to him. If this proceeding were allowed, it is obvious, that no appeal could be prosecuted from a Court overruling a demurrer to the Court above, for the points in respect of which the Defendants particularly relied might be obviated by a short amendment. Here, a bill is filed, to which the Defendant demurs; until the demurrer has been heard, the Plaintiff may obtain an order of course to amend, on certain terms. The Court, at the hearing of the demurrer, either allows it, with leave to amend, or overrules it; but in either case, the parties have a right to appeal.

(a) 4 *Myl. & Cr.* 554.

appeal. If the Court grant the leave to amend, the Defendant may ask that any proceedings may be stayed until the appeal has been disposed of; the order is then made in the presence of all parties. But unless informed by the Plaintiff, the officer of the Court knows nothing of what has taken place: he considers it the common case of amendment before answer, and makes the order, by which the very object of the appeal may be defeated. It may lead to very inconvenient results. Suppose, for instance, the Statute of Limitations was a bar to the Plaintiff's bill, and the Defendant had demurred on that ground, it is plain, that the simple insertion of some facts, which were not true in reality, might prevent the demurrer. The Defendant might in that case wish to plead to the bill, but the rule against two dilatories would prevent him. It is plain, that the only reasonable course is that laid down by Lord *Langdale*, in *Lewis v. Cooper*, which made it incumbent on the Plaintiff to state to the officer of the Court, in this case, that the demurrer had been overruled, and that the Defendant had appealed from the decision. Any other course would lead to useless litigation. If that had been stated here, the officer would not have granted the order to amend, and it would have become necessary for the Plaintiff to have applied to the Court for a special order, which might have been made on terms, and would have been liable to an appeal.

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I am of opinion that the existing order is not a proper one, under the circumstances of this case. It must, therefore, be discharged; the amendment must be expunged, and the Plaintiff must pay the costs of the motion. I proceed entirely upon this ground:—that the Plaintiff had distinct notice of the appeal being set down before he obtained the common order to amend.

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April 18.

May 28.

HOBSON v. NEALE.

The Legacy Duty Acts are to be construed strictly, and in favour of the subject.

A will empowered the trustees, with the consent of A., to sell the real estate, and invest a sufficient sum to answer two annuities. The rents being deficient to pay the annuities, the Court ordered a sale out of the produce, and 20,000*l.* consols were purchased to provide for the annuities. Legacy duty being claimed on the *corpus* of the consols, held, that the validity of this claim depended on whether the sale had taken place under the general jurisdiction of this Court, or under the power in the will, and the

Court having held the former, determined that no legacy duty was payable.

The Attorney-General attended in a cause to which he was not a party, to support a claim for legacy duty upon a fund in Court. The claim failed: Held, that the Crown was not entitled to costs.

THE testator, by his will, appointed three persons to be his executors and trustees, and he directed payment of his debts and pecuniary legacies out of his personal estate, so far as the same would extend. He devised his real estates to his trustees in fee, upon trust, by mortgage or sale thereof, or of a competent part thereof, or by and out of the rents, issues and profits thereof, or by cutting down timber or other trees, or by any of the ways and means, as should seem meet, to levy and raise sufficient to pay (after his personal estate had been applied so far as the same would extend) his debts and legacies. And upon further trust, by the ways and means aforesaid, to levy and raise, yearly and every year during the respective lives of his two infant daughters *Harriet* and *Louisa Hobson*, two annuities of 300*l.* each, for their respective, sole and separate use. The testator directed two sums of 6,000*l.* to be raised after their deaths, for the portions of their children. And he directed the trustees to stand seised of his real estates, subject to the charges, or so much as should not be sold, in trust for his brother *George Hobson* for life, with remainders over.

And the testator provided, that, notwithstanding any of the trusts aforesaid, *it should be lawful* for his trustees,

tees, with the consent of *George Hobson*, and after his decease, with the consent of the persons beneficially entitled to the estate, to sell the whole or any part of the real estate, and invest sufficient to satisfy the annuities, and to provide for the portions. On failure of the portions, the amount was to fall into the residue of the real estate.

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The testator died in 1822, and the trustees, with the personal and the produce of part of the real estate, discharged all the debts and legacies, except a legacy of 500*l*. The rents of the unsold portion of the real estate were insufficient to keep down the two annuities of 300*l*., and, in 1824, *George Hobson* and his infant children instituted a suit against the annuitants and trustees, stating such deficiency, and that it would be for the benefit of the Plaintiffs that the real estate should be sold, and that *George Hobson* consented thereto, but that the trustees declined to sell. The bill prayed the usual accounts, and a reference to the Master to inquire, whether it would be for the benefit of the Plaintiffs, that the whole or any part of the estates should be sold, and for a sale accordingly. The trustees admitted they declined to sell, or to act in the exercise of the aforesaid powers, except under the direction of the Court. And they submitted, whether they were empowered to sell with the concurrence of *George Hobson* alone, and without the consent of the several persons beneficially interested in the ultimate trusts of the monies to arise by such sale. One of the trustees prayed to be discharged from the trusts, but submitted to act as the Court should direct.

In 1826, it was by the decree, referred to the Master to inquire, whether it would be proper, that the whole or any part of the estates should be sold. The parties, in

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the Master's office, waived the inquiry, and on further directions in 1828, no party opposing it, the whole estate was directed to be sold, and the principal part was sold accordingly. Out of the purchase money, 500*l.* was applied in payment of the legacy remaining unpaid, 1,300*l.* in payment of the arrears of the annuities, and 20,000*l.* consols were carried over to a separate account to answer the annuities.

George Hobson died in 1835, and upon the death of the annuitants without issue, a petition was presented for payment out of court, to the parties entitled, of the fund set apart to answer the annuities. A question was then raised, whether the 20,000*l.* consols were subject to a legacy duty under the 55 *Geo.* 3, c. 184 (*a*), which imposes a duty on "the clear residue" of "the monies to arise from the sale" &c. of any real estate directed to be sold by any will. The court directed the solicitor of the Commissioners of the Inland Revenue to be served with the petition, and a case was afterwards directed for the opinion of the Court of Exchequer, whether any legacy duty was payable in respect of the 20,000*l.* consols.

The case having been argued (*b*), the court certified as follows:—We are of opinion, "that if the Court of Chancery, when they made their decree, *May* 26th, 1826, whereby they ordered the sale, in this case, of the testator's estate, really acted on their general power of ordering sales of real estate, when the *corpus* of such estate is charged with an annuity and such annuity is in arrear, and, on that ground, ordered the sale of this property, in order the better to secure the payment of the annuities to the testator's daughters, then the legacy duty is not payable to the Crown.

" But

(*a*) Schedule, Part 3, tit. "Legacies."

(*b*) See *Hobson v. Neale*, 8 *Exch. Rep.* 368.

"But if that court really acted on the clause in the testator's will, and, in consequence of the will containing this clause, compelled the trustees to execute the power, and exercise the discretion thereby given to them by the testator, then the legacy duty is payable to the Crown, inasmuch as we think, that in that case the sale of the real estate was substantially by the direction of the testator himself. And we leave it to the Court of Chancery to determine, whether, in fact, this case falls under the first or second of these two alternatives.

"*Fred. Pollock,*

"*James Parke,*

"*E. H. Alderson,*

"*Samuel Martin.*"

The case now came on upon the Judges' certificate.

Mr. *Bagshawe* and Mr. *Bagshawe*, junior, in support of the petition. No legacy duty is payable on the 20,000*l.* consols, for, in directing the sale, the court proceeded upon its general powers, and not upon the authorities contained in the will, which the trustees declined to exercise. The power of selling the estate, in order to provide a fund for payment of the annuities, was discretionary, and it is now clearly settled (a) that this court will not exercise a discretionary power. The sale must therefore have taken place under the general authority of the Court, for the convenience of the parties interested, and to avoid the expense of a succession of sales for raising the annuities, as they from time to time fell into arrear. No sale would have been directed under the power, until it had been ascertained, that it would

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(a) *Fordyce v. Bridges*, 2 *dergast*, 3 *House of Lds. Cas.*
Phill. 497; *Prendergast v. Pren-* 195.

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would be for the benefit of all parties interested, and the Court would not have sanctioned a sale of more of the estate than was absolutely necessary for the purpose of keeping down the annuities. This sum of 20,000*l.* was not necessarily raised in the due performance of that trust of the will, but for the benefit of the persons interested in this estate under the general jurisdiction. They referred to the *Attorney-General v. Simcox (a)*; *Picard v. Mitchell (b)*.

Mr. *W. M. James, contra*. The Court has no general jurisdiction to sell the whole of a real estate for the payment of a charge upon it, amounting to much less than its value; it can only raise what is necessary to discharge the amount due. Neither can the Court, under its ordinary jurisdiction, convert the whole of a large estate for the purpose of providing for the accruing payments of annuities charged upon it. The sale, therefore, in this case, must have taken place under the powers contained in the will, with the assent of the trustees and the parties interested; and if that be so, the legacy duty attached to the produce, notwithstanding the powers may originally have been discretionary.

The MASTER of the ROLLS.

There is considerable obscurity in this case, which probably arises from the circumstance, that the Court itself did not exactly ascertain upon what footing it proceeded when it ordered a sale of this estate. I however entertain little doubt as to the conclusion to which I ought to come upon the finding of the Court of Exchequer, which has, in substance, certified, that if
the

(a) 1 *Exch. Rep.* 749.

(b) 14 *Beav.* 103.

the estate was sold under any power inherent in this Court, and independently of the will, no legacy duty is payable, but that if it was sold under the clause contained in the testator's will, then legacy duty is payable.

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Now the bill was manifestly framed with a view of having the trusts or discretion reposed in the trustees executed, and on the notion that if the trustees refused, the Court itself might execute them for the benefit of the persons interested. The trustees, by their answer, declined to execute the trust or exercise their discretion, but submitted to act as the Court should direct; and one of them sought to be discharged, though he apparently afterwards changed his mind and was willing to continue. Upon that, the Court made the only decree it could make if it intended to execute or act upon that clause of the will, that is, it directed an inquiry, whether it would be for the interest of the persons entitled in remainder that this estate should be sold. Without that, the Court would not, I apprehend, have executed or acted upon that clause or trust (if it can properly be called a trust) for the sale of the testator's real estate.

Where a discretion is reposed in trustees, the Court allows but does not compel them to exercise it; and if they do not think fit so to do, the Court merely executes the trust and does not exercise the discretion. Thus, in the common case, where a discretion is given to trustees to divide a fund between a class in such proportions as they think right, the Court, if called on to execute the trust, can only divide it equally between the persons composing the class; and, whatever may be the circumstances of the case, it never attempts to exercise the discretion (a). It appears that the reference to the

(a) *Fordyce v. Bridges*, 2 *Phill.* p. 512.

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the Master was abandoned, and that the cause then came on for further directions. At that time, the arrears of the annuities amounted to 1,300*l*. I fully concur in the observation, that this Court will not sell a large estate in order to satisfy a small charge, and that the course which this Court would pursue in such a case would be, to ascertain the amount for which a government annuity of the same amount could be bought, and then sell so much only of the estate as would be necessary to pay the arrears and purchase an annuity; but if the Court saw, that this would, in fact, exhaust or very nearly exhaust the whole estate, then I apprehend it would, if the persons interested in the estate wished it, or if it appeared to be for the benefit of infants, direct the whole estate to be sold for that purpose, and in that state of circumstances a perfectly good title could be made to the purchaser. If there appeared a reasonable ground for expecting that the whole estate would be required for paying the annuities, I think it clear, that this Court would not, in the exercise of its powers, sell a portion of the estate to pay the existing arrears of the annuities, and two or three years afterwards repeat the same process, and thus fritter the whole estate away in costs.

The Court of Exchequer have left it to me to decide on which of two principles the sale took place, and have stated, that in one case legacy duty is payable, but that in the other it is not. If I am left to determine upon what principle the Court really proceeded in ordering a sale, the balance of my opinion would be, that the reference to the Master having been abandoned, and the annuitants, who were parties to the cause, being entitled to have their annuities paid or secured to them, it is probable that the Court acted upon the rule for securing the annuities, and not upon the clause for sale
contained

contained in the will. I have no doubt, however, that the Court would not have so acted, unless it had been reasonably clear, that it was for the benefit of the infants that the estate should be sold.

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It may undoubtedly be said, that if so, the Court might equally have acted upon the clause in the will, but I am guided, in a great measure, by this consideration (which has been acted on in a great number of cases), that the Legacy Duty Acts being Acts which impose duties on the subject must be construed strictly^(a), and consequently, that if there be any doubt whether duty is payable or not, the parties sought to be charged are entitled to have the benefit of that doubt. In this case, if it were more doubtful than I consider it to be, and even if the balance of my opinion were not in favour of the belief, that the Court acted under its general power, and not in execution of the clause in the will, yet, if I found it impossible to come to any satisfactory conclusion as to the principle upon which the Court acted in selling the estate, I should have thought it proper to give the parties the benefit of the doubt.

Acting, therefore, upon the certificate, which has been returned to me from the Court of Exchequer, in the alternative, I am of opinion that I ought to declare, that no legacy duty is payable on the *corpus* of this estate.

Mr. James, the Attorney-General, asked for his costs, observing that he always had costs in these cases.

The MASTER of the ROLLS.

Only under some statute, but the point had better be

(a) *William v. Sangar*, 10 East, 69; *Denn v. Diamond*, 4 Bar. & Cres. p. 245; *Doe v. Snaith*, 8 Bing. 153; *Wroughton v. Turtle*, 11 Me. & Welsby, p. 567.

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be looked at, in order to see if they are provided for by the Legacy Duty Acts. It seems to me strange that the Crown should always have costs and never pay them.

May 28.

The case was mentioned again as to the costs of the solicitor of the Commissioners of Inland Revenue.

Mr. *Bagshawe*. There is nothing in the Stamp Act which entitles the Crown to costs, when unsuccessful, and the practice is otherwise. In *Shirley v. Earl Ferrers* (a), a petition was presented, praying a declaration that legacy duty was not payable on a fund in Court, and to remove a stop order affecting it; and the Lord Chancellor, after hearing Mr. *Twiss* and Mr. *Romilly*, being of opinion that legacy duty did not attach upon the rents and profits, &c., removed the stop, and ordered the taxation and payment of the costs of all the parties except of the Crown. The Court did the same in a case of *White v. Briggs*, after hearing Mr. *Twiss* and Mr. *Maule*, for the Crown (b).

Mr. *James*, *contra*, insisted that it had always been considered the practice to allow the costs of the Crown, even where unsuccessful, in those cases where, for the convenience of the parties and to save expense, the solicitor of stamps voluntarily appeared in this Court in a suit to discuss a question of duties.

The MASTER of the ROLLS.

The general practice does not appear to entitle the Crown to the costs. I must follow the general rule, that the Crown neither receives or pays costs, except where they are provided for by statute.

(a) Lord Chancellor, *December 9, 1842*, cited from the papers in the cause.

(b) Lord Chancellor, *February 28, 1846*.

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PLAYFAIR v. COOPER.

PRINCE v. COOPER.

Feb. 24.

May 30.

BY articles made on the marriage of Mr. and Mrs. *Cooper*, in 1832, they covenanted to convey certain property to trustees, upon trust to sell, and out of the proceeds to pay the costs and to raise two sums of 150*l.* and 1,000*l.*, and to lay out the residue of the proceeds and stand possessed thereof, upon trust, during the joint lives of *F. Cooper* and wife, to pay the income to her, and after her death to pay one moiety of the income to *F. Cooper*, for life, and after other limitations (which failed), then upon such trusts as *Hannuk Steward* should by will appoint.

The marriage took effect, and pursuant to the covenant, a freehold estate called "*Spennells*" was, in 1836, conveyed to the trustees of the settlement.

Mrs. *Cooper* died on the 1st of *May*, 1837, having by her will, made in pursuance of the power, appointed that the trust funds should be transferred into the names of trustees, on trust (subject to the life interest of her husband in a moiety thereof) to raise thereout 2,000*l.* for *F. Cooper*, and 100*l.* for *John Cole*, and to stand possessed of the residue, "upon trust, during the life of her father, *Richard Prince*, to levy and raise, by and out of the interest, dividends, and annual produce of that such arrears were a charge upon

the corpus of the trust property, and that the tenant for life was only bound to keep down the interest of such arrears.

Held, also, that the claim for arrears beyond six years was not barred by the statute, there being a trust for the payment.

A testatrix directed her trustees to levy and raise, out of the interest, dividends and annual produce of certain trust funds, an annual sum of 100*l.*, and pay the same to *R. P.* during his life; and "subject and without prejudice to the payment of the said annuity," to pay the income of the trust funds to *F. C.* for life, and after his decease, "subject and without prejudice, as aforesaid," to stand possessed of the trust funds for other persons. The income of the fund was insufficient to pay the annuity. Held, that such arrears were a charge upon

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of the remaining moiety of the trust funds and securities, an annual sum of 100*l.* clear of all deductions," and pay the same to *R. Prince*; and subject and without prejudice to the payment of the said annuity, pay the income of the trust funds to, or permit the same to be received by *Frederick Cooper*, and his assigns, for his life, and from and immediately after the decease of *F. Cooper*, subject and without prejudice as aforesaid, upon certain trusts for her brother *John Prince* and her four sisters and their children.

In 1839, and in order to raise the charges, the *Spennells* estate was mortgaged for 3,010*l.* to *Henry Chase-more*, for a term of 500 years, by way of mortgage.

Frederick Cooper, after his wife's death, took possession of the *Spennells* estate, but after payment of the interest on the charges, the surplus of the moiety of the income was insufficient to pay the annuity of 100*l.* given to *Richard Prince*, and at his death, in *August*, 1844, the sum of 350*l.* was due to him in respect of arrears.

F. Cooper insisted, that, according to the will of *Mrs. Cooper*, the annuity was payable out of the income only of the trust estates, which accrued during the life of *Richard Prince*, and which being insufficient (after paying the interest properly chargeable thereon) for payment of the annuity in full, the amount failed *pro tanto*. *Playfair*, the legal personal representative of *Richard Prince*, instituted the first suit of *Playfair v. Cooper*, praying payment of the arrears of the annuity out of the income of *Frederick Cooper*.

The second suit, of *Prince v. Cooper*, was instituted by *John Prince*, for a sale of the estate, and the administration of the trust.

The

The first cause now came on to be heard, on motion for a decree.

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Mr. Roupell and Mr. Haynes, for the Plaintiffs. The trust is, during the life of *R. Prince*, "to levy and raise the sum of 100*l.* out of the dividends, interest, and annual produce of the trust funds," and not "to apply so much of the interest, dividends and annual produce, as would be sufficient." That, therefore, constitutes an unlimited charge upon the interest, dividends and annual produce of the trust funds, or on the *corpus* itself, until the amount has been fully paid and satisfied, and not merely upon the income during the life of *Richard Prince*. Besides, the gift of the income to *F. Cooper* is expressly made "subject and without prejudice" to the payment of the annuity, so that the income, during his life, at all events, is liable to the charge; *Allan v. Backhouse* (a); *Ex parte Wilkinson* (b); *Revel v. Watkinson* (c).

Mr. Lloyd and Mr. Bovill, for the Defendants. The trust for raising the annuity is expressly limited to the income of the trust fund, accruing during the life of *Richard Prince*; *Miller v. Huddleston* (d); *Foster v. Smith* (e). Therefore, neither the future income nor the *corpus* of the fund is chargeable with the arrears. But supposing the arrears to have been a charge on the future income, the claim is now barred by 3 & 4 *Will.* 4, c. 27, s. 42, the annuitant having died more than six years before the institution of the suit.

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I am of opinion that *Richard Prince* was entitled to the

(a) 2 *Ves. & B.* 65.

(b) 3 *De G. & Sm.* 633.

(c) 1 *Ves. sen.* 93.

(d) 3 *Macn. & G.* 513.

(e) 1 *Ph.* 629.

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the payment, in full, of the 100*l.* a year, during his life, though the income of the fund, after payment of interest on the mortgage debt, might be insufficient to satisfy his claim. The words of the will are clear upon this point. The trust is to raise, out of the interest, dividends and annual produce, the annual sum of 100*l.*, and pay the same to *R. Prince*. These words would of themselves justify the trustees in raising the annuity in full, and *R. Prince* in insisting on its being so raised and paid; but the point is made more clear by the language of the subsequent bequest to *Frederick Cooper*, which is given "subject and without prejudice to the payment of the said annuity;" and again, the gift over, after the decease of *F. Cooper*, is "subject and without prejudice as aforesaid," and the words used by the testatrix, in directing the annuity to be raised, do not, in any respect, differ from those by which she directs her trustees to raise the two several sums of 2,000*l.* and 100*l.* for the benefit of her husband and *John Cole* respectively. The case of *Foster v. Smith* is distinguishable from this case; the direction to raise the annuity was confined to the life of a particular person, the trustees being directed to receive the rents and profits, "when and as they should become due and payable, and thereout" pay an annuity to the testator's wife during her life, "and upon and immediately after her decease" to convey the trust estates to certain parties mentioned.

As to the Statute of Limitations, it is no bar to the present claim, for the trustees were possessed of the fund, on trust, among other things, to raise and pay the annuity, and therefore the question of adverse possession by *F. Cooper* does not arise. The case of *Phillipo v. Munnings* (a) is an authority for this, if authority were wanting.

(a) 2 *Myl. & Cr.* 309.

wanting. *R. Prince*, at the time of his death, was entitled to have the arrears of his annuity raised out of the estate, in pursuance of the trust; and being so entitled, the trust continues to operate in favour of his representative, notwithstanding the lapse of time.

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I do not mean to express any opinion as to whether the arrears were payable out of the life interest of *F. Cooper*, or out of the *corpus* of the estate. That is a question between the tenant for life and the parties entitled in remainder, and is not now before the Court; but as between the Plaintiff and the trust estate, both income and *corpus* are liable to make good the arrears due in respect of the annuity.

An account must be taken of what is due, and there must be a declaration that the sum so found due is a charge upon the estate, and it must be paid by the trustees, who represent all parties in the suit. But the question as to whether the arrears of the annuity are payable out of the annual income accruing due, or out of the *corpus* of the estate, must stand over till the hearing of *Prince v. Cooper*.

The cause of *Prince v. Cooper* having come on to be heard, the question as to whether the arrears were payable out of the income, or the *corpus* of the estate, was by arrangement between the parties brought before the Court for its decision.

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Mr. Roupell and Mr. Haynes, for *Playfair*, the Plaintiff in the first suit. The life estate of *F. Cooper* is primarily liable to make good the arrears; for by the words of the will, it is expressly given "subject and without

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without prejudice to the payment of the annuity" to *R. Prince*. If the income of an estate which is charged with a gross sum of money and devised to a tenant for life, expressly subject to that charge, is, at first, insufficient to keep down the interest, but subsequently exceed the payments, as they accrue due, the surplus remaining in the hands of the tenant for life cannot be applied in satisfaction of the arrears; *Tracy v. Lady Hereford* (a); *Revel v. Watkinson* (b). This case comes precisely within the same rule.

Mr. C. Hall, for parties having the same interest in remainder as the Plaintiff. The case does not come within that class of authorities, in which the arrears of a gift are to be made up out of the capital, where the income is insufficient to satisfy the claim. The testatrix herself distinguishes between income and capital. First, she directs two sums of 2,000*l.* and 100*l.* to be raised out of the capital, and subject to that, she directs her trustees to stand possessed of the residue, upon trust to levy and raise, out of the dividends, interest and annual produce, during her father's life, the sum of 100*l.* a year; and therefore, if there was not sufficient income during his life to pay the annuity, recourse must be had to the next disposition of the income in favour of *F. Cooper*, who is to enjoy it for his life, subject to the payment of the annuity. The tenant for life may, indeed, be thus made to bear a large part of the burthen of paying off the arrears; but the testatrix has made him chargeable, for she has said he is to take the income subject to the annuity.

Mr. Lloyd and *Mr. Bovill*, for the trustees and executors.

Mr.

(a) 2 Bro. C. C. 128.

(b) 1 Ves. sen. 93.

Mr. *James* and Mr. *Giffard*, for the representative of
John Cole.

Mr. *Law*, for a mortgagee.

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I am of opinion that the question is concluded by my former decision. I find that the income of the trust property is given to parties in succession, subject to the payment of the annuity. If, therefore, the income had been more than sufficient to pay the annuity, the surplus would have belonged to the tenant for life; but if the income of the property had not been sufficient to pay the annuity, one of two things must have happened, either the annuity must have partially failed, or the arrears must be a charge on the property itself. I have already decided that it is a charge on the property. The cases cited strengthen my view of the case. They are only authorities in favour of the well established rule, that, whatever the charges upon an estate may be, the interest upon them must be kept down by the tenant for life, out of the income; I think the same rule is applicable to the arrears of the annuity in this case, and that, after the death of the annuitant, they became a charge on the property itself, in the same manner as if the property had been a mortgage to that amount.

I am of opinion, therefore, that as long as *R. Prince* lived, he took the whole of the income, and that so much of the annuity as at his death remained unpaid, became a charge upon and must be raised out of the corpus of the property. Consequently, *F. Cooper*, the tenant for life, must pay, not the whole arrears, but so much as, during the continuance of his life estate, will keep down the interest on the charge.

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PHILLIPS v. TURNER.

May 31.

A testator bequeathed "the principal sum" secured to him by a mortgage in fee. It was afterwards voluntarily paid off in the testator's lifetime. Held, that the legacy was adeemed.

A testator bequeathed to his daughter his twenty shares in the S. office, or in any other office in which the same had been or should be transferred, and all his right therein, or in the monies arising or that might arise from the sale thereof. Negotiations, of which the testator was aware, were then pending, for the transfer of the business of the S. office to the A. office, which were afterwards concluded, and, in lieu of the S. shares, the testator received a number of A. shares and a sum of 1,200*l*. Held, that the A. shares passed under the bequest, but that the money did not.

JOSEPH BURCH SMITH, by his will, dated in 1845, after providing for his elder daughter, *Lucy Burch Phillips*, bequeathed to his younger daughter his twenty shares in the *Suffolk* and General County Amicable Fire Office, and other property.

The testator, by a subsequent codicil, dated in 1848, bequeathed unto *Lucy Burch Phillips* "*the principal sum of 3,000*l*., and interest to accrue thereon, secured to be paid to him by a mortgage in fee, made*" by *W. H.*, of a messuage, &c. (describing it).

By a second codicil, dated in 1849, the testator revoked the bequest to his younger daughter of his twenty shares in the *Suffolk* and General County Amicable Fire Office, and proceeded thus:—"I give and bequeath the same and all other my right and interest in the said shares, either in the *Suffolk* and General County Amicable Fire Office, *or in any other office in which the same have been or shall be transferred or placed*, and all my right, interest and property therein or thereto, or in the monies arising or that may arise by sale of any of the said twenty shares unto my eldest daughter *Lucy Burch Phillips*." He by both codicils expressed a desire to place his daughters on an equality.

At the date of the second codicil, negotiations, of which

which the testator was aware, were going on between the *Suffolk* County Fire Office and the Alliance Fire and Life Assurance Office, for the purchase by the latter of the business of the former; this resulted in an arrangement, whereby the latter was to take the shares of the former at a price, which was to be paid partly in their own shares and partly in money. In pursuance of this arrangement the testator was allotted sixty-eight shares of the Alliance Company and 1,200*l.* in cash, which latter sum was, in *February*, 1850, paid into his bankers.

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In *October*, 1850, the mortgage for 3,000*l.* was voluntarily paid off by the mortgagor, and the mortgaged estate was reconveyed by the testator.

The testator died in *March*, 1852.

Upon the construction of the will and codicils two questions arose; first, whether, under the circumstance, *Lucy Burck Phillips* was entitled to the 3,000*l.*, and interest, bequeathed to her by the first codicil; and, secondly, whether she was entitled to the 1,200*l.*, part of the consideration for the *Suffolk*, &c., shares. To determine these points, a special case was filed by *Lucy Burck Phillips*.

Mr. Thring, for the Plaintiff, contended, that the legacy for 3,000*l.* was not adeemed by the repayment of the money to the testator; for the sum was described by him as being in a particular investment, and a change of the investment did not destroy the subject of the gift, which was a specified "sum." Besides, the payment of the debt was voluntary on the part of the debtor, and the testator had not called it in. That if it should be held that the legacy was adeemed, the intention expressed by the testator of placing his

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two daughters on an equality would be defeated. He cited, on this point, *Pettiward v. Pettiward*(a); *Ellis v. Walker*(b); *Attorney-General v. Parkin*(c); *Pawlet's Case*(d); *Le Grice v. Finch*(e); *Earl of Thomond v. Earl of Suffolk*(f); *Crockat v. Crockat*(g); *Ford v. Fleming*(h); *Coleman v. Coleman*(i); *Rider v. Wager*(k).

As to the second question, he contended, that the testator, being aware of the negotiations, which were pending between the two companies at the time he made the second codicil, considered, no doubt, that the arrangement which was made amounted to a sale of his shares by the one to the other; that he therefore made the codicil in order to provide for the change, and to bequeath the produce of the sale, whatever it might be, whether in substituted shares, or money, or both; for he referred, in the codicil, to the transfer of the shares to any other office, and included, in his bequest, his "right, interest, and property in the money arising, or that might arise, by sale of any of the said twenty shares." That as the 1,200*l.* did, in substance, arise from the sale, the gift was analogous to a bequest of the produce of an estate which the testator had contracted to sell, and that it therefore carried the 1,200*l.*

Mr. *Selwyn*, for the executors, contended, that the shares in the *Suffolk* Company were represented by the shares in the *Alliance* Company; and that the testator having received the 1,200*l.*, the legacy was, to that extent, adeemed. That if the testator had not received the

(a) *Finch*, 152.  
 (b) *Amb.* 309.  
 (c) *Amb.* 566.  
 (d) *Sir T. Raym.* 335.  
 (e) 3 *Mer.* 50.

(f) 1 *P. Wms.* 461  
 (g) 2 *P. Wms.* 164.  
 (h) 2 *P. Wms.* 469.  
 (i) 2 *Ves. jun.* 638.  
 (k) 2 *P. Wms.* 328.

**the** 1,200*l.*, there might be ground for contending that **it** passed by the bequest; but having received it, it **became** amalgamated with his general personal estate, **and** did not pass to the specific legatee. That the case **was** similar to a bequest of stock and dividends, which, **as to** the dividends received by the testator, did not **pass** to the legatee.

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**Mr. Thring**, in reply.

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**As** to the first question, the ademption of the legacy **of** the debt of 3,000*l.*, I think the cases which have **been** cited are clear in one respect, though not so in **another**. If it be once settled, that such a legacy is **specific**, then it is clear, upon the authorities, that the **destruction** of the subject by the testator, in his lifetime, **operates** as an ademption, but the difficulty is to **determine**, what are specific and what are general legacies, **and** as to this point, the distinctions taken are very fine. **In** the present case, I have no doubt that this was a **specific** bequest of the debt itself; and when the debt **ceased** to exist, there was nothing upon which the **bequest** could operate. I am of opinion that the legacy **was** adeemed, and that it makes no difference, whether **the** payment to the testator was voluntary or compulsory.

**As** to the 1,200*l.*, though there is certainly more difficulty with respect to it, it must follow the same rule as the other sum. The first part of the bequest is a clear and specific gift of the shares in the *Suffolk* County Fire Office, or in any other office in which the same had been or should be transferred or placed; and there could be no doubt, that if the testator had sold the

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the shares and put the money into his pocket, the legacy would have been adeemed.

The only question is, whether the latter part of the bequest, by which he gives the money arising from the sale of the shares, is a specific bequest of those monies, and whether the 1,200*l.*, in that case, could be treated as the produce of such a sale? I am of opinion that the bequest cannot be so considered, and that the 1,200*l.* were not properly monies arising from a sale of the shares, but what, in the case of real estates, is called *owelty* of exchange, and was paid as an equivalent, to make up the difference between the old and new shares. I think, therefore, that the legatee can only take the new shares by way of substitution for the old ones, and that the 1,200*l.* is not included in the bequest.

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### MORRIS v. MORRIS.

June 1.

The 29th section of the Statute of Wills has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one," which

additional words, upon the authority of decided cases, modify their meaning.

A testator devised an estate in fee to his son, but if he should die under twenty-one, over. By a codicil, he limited the estate over, in the event of the son dying without issue "or" under twenty-one. Held, that "or" must be read "and," and that the executory devise over took effect only on the happening of both events, and, consequently, that A., on attaining twenty-one, had an absolute estate in fee simple.

THE testator, by his will, dated in 1839, gave to his son, *John Morris*, a farm and land called *Panty-rathro*, subject to a charge of 1,000*l.*, for the benefit of the testator's daughters. He also devised other lands to his two younger sons, and gave legacies to his daughters. The testator declared, that his children should have possession of their several properties and legacies,

legacies, on their attaining twenty-one years, but if any of them died before that age, the share of him or her was to go to the survivors.

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The testator made a codicil to his will, dated 28th March, 1839, in these words:—"I will, that if my son, *John Morris*, shall die without issue, or before he shall attain the age of twenty-one years," that "the *Pantyrathro* estate shall go to my son *William Morris*, and his heirs," subject to a charge of 1,000*l.* for the testator's other children. The testator died in 1840, and *John Morris*, having attained twenty-one, contracted to sell the *Pantyrathro* estate to the Defendant, *Davis*, for 4,200*l.* The purchaser objected to the title, on the ground that the Plaintiff merely took a fee, with an executory devise over in favour of *William Morris*, either in the event of his dying under twenty-one years, or of his dying without leaving issue at his death. The point came on for argument upon a special case.

Mr. *Renshaw*, for the Plaintiff. *John Morris* either took an estate in fee simple with an executory devise over, or an estate tail. The executory devise over to *William Morris* is made to depend upon the happening of two concurrent events, viz., on his dying under twenty-one, and without issue; and unless both of these happen, the gift over cannot take effect. *John Morris* has attained twenty-one, and therefore the happening of the two events has been rendered impossible, and the executory devise has failed. In cases of this description it has been held, that the word "or" must be construed "and;" for, if not so construed, the children of the Plaintiff, if he had died under twenty-one, would be excluded; *Soulle v. Gerrard* (a); *Eastman v. Baker* (b); *Fairfield*

(a) *Cro. Elis.* 525.(b) 1 *Taunt.* 174.



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*Fairfield v. Morgun*(a). Secondly, but supposing the word "or" should, in this case, be taken in its ordinary alternative signification, the words "dying without issue" would then import an indefinite failure of issue, and give him an estate tail, which he may bar and obtain the fee; so that in either case the Plaintiff can make a good title.

Mr. *W. M. James* and Mr. *Wigleworth*, for the purchaser. The Plaintiff cannot make a good title, by reason of the gift over to *William Morris*. This gift over is to take effect upon the happening of either of two contingencies, for the form of expression is in the disjunctive. The particle "or" is alternative, and the limitation over can only fail upon the happening of both the events, namely, by death, under twenty-one, and by a death with issue. By his will, the testator had already provided for the event of a child dying under twenty-one, and it was therefore unnecessary again to provide for that contingency. By his codicil, the testator intended to provide against another event, viz. the devisee's dying without issue; and, accordingly, he mentions that event first in order, which is contrary to the usual form of expression in such cases. Such being the intention, the word "or" cannot be construed in a conjunctive sense, as the Plaintiff contends, more particularly as the present tendency of the Court is to construe words in their ordinary acceptance; *Mortimer v. Hartley*(b).

Secondly, it is said, that the words, "dying without issue," create an estate tail, inasmuch as they import a general failure of issue. This may have been their effect

(a) 2 Bos. & P. (N. R.) 38.

(b) 3 De G. & Sm. 316.

effect before the late Statute of Wills(a), but since that act passed they must receive a different interpretation; for, by the 29th section, any words which may import an indefinite failure of issue, shall be construed to mean a failure of issue in the lifetime of such person, and not an indefinite failure of his issue. The codicil, therefore, must be read as if the words were, "if my son *John Morris* shall die without issue *living at his death*, or before he shall attain twenty-one." These words would neither give him an absolute fee nor an estate tail. The executory devise, therefore, has not failed by *John Morris* attaining twenty-one, and if he should die without leaving issue living at his death, the limitation over will take effect.

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If this will had been made prior to the late Wills Act, no question could have arisen upon it, as to the estate taken under that devise. It is clear, upon the authorities, that the devise in the will is in fee, with an executory devise over, in the event of *John Morris* dying under twenty-one. The codicil then directs, that "if he should die without issue, or before he should attain " twenty-one, the property is to go over. Now if, upon the authorities under the old law, "or" be read "and," that is, if the two contingencies, viz dying without issue, and dying under twenty-one, are to be read conjunctively, the devise would amount to a gift in fee, with an executory devise over, in case both contingencies should happen; and *John Morris* having attained twenty-one, this has now been rendered impossible.

But if, on the other hand, the word "or" be taken disjunctively

(a) 1 Vict. c. 26.

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disjunctively, and in its ordinary signification, then the gift in fee to *John Morris* would, in one event, be cut down to an estate tail, by force of the words "dying without issue," taken alone, and, in the other event, would be determinable upon *John Morris* "dying under twenty-one," which cannot now happen, since he has already attained twenty-one; so that, in either event, the Plaintiff would have, or could acquire, the absolute fee.

But it is contended, that "or" being read disjunctively, then, by the operation of the 1 *Vict.* c. 26, s. 29, the words "dying without issue" must be construed, "dying without issue living at his death," and not an indefinite failure of issue, and that, therefore, these words do not cut down the gift in fee to an estate tail; so that there is a devise in fee, with an executory devise over, in case *John Morris* should die without issue living at his death, and, as that may yet happen, he does not take an absolute estate. I am, however, of opinion, that the late statute cannot have any effect upon the construction to be put upon these words as they occur in the codicil. The 29th section has no application to cases in which those words are combined or coupled with other words, which have been the subject of authority and decision, such as "dying under twenty-one;" nor does it, in such cases, alter such a gift, so as to make it determinable upon a dying without issue living at the death, or under twenty-one.

On the authority of the decided cases, I am of opinion, that the word "or" must be read "and," notwithstanding the case of *Mortimer v. Hartley* (a), which is peculiar, and can have no effect upon the decision

(a) 3 *De G. & Sm.* 316.

sion in this case. It also appears to me that the placing of the words "dying without issue" before the words "before he shall attain the age of twenty-one" makes a stronger case for the construction I put upon them.

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I am therefore of opinion, that, under the will and codicil, John Morris, the son, took an estate in fee simple, with an executory devise over, which in the event that has happened, of his having attained twenty-one, cannot take effect; and that, consequently, he has an indefeasible estate in fee simple.

SPENCE'S Case.—*Re* NEWCASTLE, &c. Banking Company.

THIS company was ordered to be wound up. A testator had shares in it; and, after his death, his executors purchased other shares.

June 2.

Executors, who, after the death of their testator, had purchased further shares, held, as to the latter, to be contributories without qualification, though they had been treated as executors in regard to such further shares.

Mr. Selwyn, for the official manager. As to the shares purchased after the testator's death, the executors must be put on the list as contributories without qualification. On the same principle as an executor, who carries on the trade of his testator, becomes personally liable.

Mr. Druce, *contra*. As to all the shares, the executors should be put on the list as executors only; *Armstrong's case* (a). The receipts are signed by them as executors, and they are entered in the books and returned as executors. It is only as executors that shares can be entered on the books in the name of more than one proprietor

(a) 1 De G. & Sm. 565.

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prietor; besides, they have never signed the deed of settlement.

*The MASTER of the ROLLS.*

I am of opinion that, with respect to these shares, they are personally liable, and that they can only look to their testator's estate for indemnity. If it were otherwise, the executor of an insolvent estate might purchase any number of shares, and keep them if they were profitable, but repudiate any liability if they turned out otherwise, and thus involve the company in an account of the testator's estate. They have purchased these shares, whether with authority under the will or not is immaterial, and they have received dividends. They are therefore personally liable.

## BENTLEY v. CRAVEN.

June 4.

Leaseholds were sold under the Court, described as "a BONDED sugar refinery," and the lease was referred to, which contained no such restriction.

The abstract showed a prior

agreement for the lease of the premises, to be used "for refining sugar IN BOND." The purchaser accepted the title, paid his purchase-money into Court, and was let into possession. The lessors afterwards instituted a suit to rectify the lease, by introducing the restriction. The Court refused to compel the final completion of the purchase, or part with the purchase-money, until the result of the suit was known.

IN pursuance of a previous agreement, dated the 11th of April, 1850, a lease was, on the 5th of June, 1851, granted by the *Southampton Dock Company*, of a sugar refinery and premises at that place. Upon a dissolution of partnership, it was by the decree, made in *November* last, ordered, that the leasehold sugar refinery and the plants, &c. should be sold. They were accordingly

accordingly put up for sale by auction, on the 19th of *January* last, by the description of a "*bonded sugar refinery*, situate within the docks at *Southampton*," &c.; and they were stated to be held under a lease, which might be seen before and would be produced at the sale. By the third condition of sale, it was stipulated, that the title should commence with the lease, and no proof or production of title prior to the lease should be required, and the purchaser was to have an underlease for the whole term, less three days.

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BENTLEY  
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Mr. *Hazlewood*, having become the purchaser, an abstract of title was delivered to his solicitor, commencing, not with the lease, as provided by the third condition of sale, but with the agreement of the 11th of *April*, 1850, which appeared to be for a lease of the premises, to be used for refining sugar *in bond*, whereas the lease itself contained no restriction against using the premises for refining sugar generally. The draft lease did contain the words "*in bond*" originally, but they had been struck out. In pursuance of an order, dated 3rd of *February*, 1853, the purchaser, who had accepted the title, paid his purchase-money into Court, and had been let into possession. The company, having discovered that the words "*in bond*" had been omitted out of the lease, filed a bill against the vendors, to have the lease rectified, by inserting the words "*in bond*." The purchaser, under the circumstances, refused to bring the draft conveyance into chambers to be settled, and the question as to his obligation to do so was therefore adjourned into Court.

Mr. *R. Palmer* and Mr. *W. D. Lewis*, for some of the vendors. The purchaser cannot refuse to complete his purchase. By the particulars of sale, he had full notice of the restricted nature of the sugar refinery; and  
though

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though the lease contained no such restriction, yet the abstract of title informed him of the agreement, which contained it. Having, therefore, accepted the title, with notice, he must take it as it stands.

Mr. *Roupell* and Mr. *Selwyn*, for parties in the same interest, and Mr. *Amphlett* for the original lessee.

Mr. *W. M. James* and Mr. *C. C. Barber*, for the purchaser, contended, that the question between the dock company ought to be settled before he completed, and that he was not bound, either by the notice or by his acceptance of the existing title, to take a lease containing the restriction stated in the agreement.

*The MASTER of the ROLLS.*

It is clear what the Court ought to do in this case. The question now before me is not as to relieving a purchaser from his purchase, but whether I can compel him to complete his contract, while a doubt exists as to his obtaining, in the end, that which he has contracted for. What the purchaser has bought is a refinery, not for refining sugar in bond, but without any such restriction. It is unnecessary to take into consideration the description contained in the particulars of sale, which expressly state, that the lease would be produced at the sale, and that a copy of it might be seen previously, at the solicitor's office. Upon referring to the lease itself, there is nothing restricting the use of the premises to the refining of sugar in bond only. The purchaser has paid his purchase-money into Court, and has been let into possession of what he bought, namely, the existing interest of the vendors under the lease. If, therefore, the purchase should eventually go off, the rights of both parties can very easily be

secured, by giving interest on the purchase-money to the purchaser, and making him pay an occupation rent to the vendors. It is not a question of acceptance of title, as has been argued, but a case in which, after the title has been accepted by the purchaser, it has become doubtful whether that to which the vendors have attempted to show title actually exists. There is the same objection to the vendors' title as if they had no title at all, for their title is to a lease totally different from the lease intended to be made to them and offered to the purchaser.

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v.  
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If I were to allow the vendors to succeed in compelling the purchaser to complete, I should be giving the vendors the purchase-money, which the purchaser might not be able to recover back, and yet he might not be able to obtain that which he had purchased, for the Dock Company, who have instituted a suit, may succeed, and then the vendors will not have had that which they have contracted to sell.

I must protect the money for the purchaser, and direct the parties to complete everything down to the execution of the deed, and the payment of the money to the vendors. The money must, in the meanwhile, be retained in Court, until the result of the suit of the Company is known.

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1853.

BARRON *v.* LANCEFIELD.

June 13.

A decree for foreclosure being made, the mortgagee, after the accounts had been taken, incurred further costs in another proceeding. Held, that he could not, by petition, obtain an order to add them to his security.

**I**N 1849, the Plaintiffs (mortgagees) filed their bill of foreclosure against the mortgagor and other mortgagees, and in *January*, 1853, the ordinary decree to take an account of principal, interest and costs, and to appoint a day for payment, &c. was made.

The Master accordingly found the amount due to the Plaintiffs, and fixed the 12th of *July*, 1853, for payment; his report had been confirmed. After this, the Plaintiffs had incurred costs in another suit, instituted by prior incumbrancers, in respect of other property, mortgaged to the Plaintiffs, which, being sold, was found insufficient to pay the prior incumbrances. The Plaintiffs now presented a petition, praying that the Defendants might not be at liberty to redeem until payment of the costs thus incurred, and which had not been included in the former account.

Mr. *Renshaw*, in support of the petition, argued, that as the accounts in a foreclosure suit might be opened by the mortgagee's receiving rents subsequent to the account (*a*), so on the other hand, where a mortgagee incurs subsequent costs, which the mortgagor is bound to pay, he ought to be allowed them, although they are not provided for by the decree.

*The MASTER of the ROLLS.*

I am satisfied I can make no order. It would be altering a decree on petition.

(*a*) See 4 *Beav.* 164; 5 *Beav.* 592; 7 *Beav.* 83.

## SUTHERLAND v. SUTHERLAND.

June 7.

THE Plaintiff claimed some leasehold property, which she alleged had been purchased with her separate estate, and had, in 1846, become vested in the Defendant, in trust for her. The bill alleged, that the Defendant had documents in his possession "relating to the matters aforesaid, and to the right of the Plaintiff, and to the Defendant's alleged right." The corresponding interrogatory followed this statement, and required the Defendant to set them forth.

A Defendant held not bound to set forth a list of documents in his possession relating to his own title.

The Defendant, by his answer, claimed the property, as the sole executor and residuary legatee of the Plaintiff's late husband, who died in 1853. He admitted the possession of some documents, and save, as aforesaid, denied that he had any "relating to the matters in the bill mentioned." He omitted the words "*relating to the right of the Plaintiff, and his own alleged right,*" and he made no admission as to the possession of the alleged will.

The Plaintiff excepted.

Mr. *Beavan*, in support of the exception. The answer is evasive; the Defendant cannot, by a general denial, relieve himself from the obligation of giving the particular discovery asked. It is manifest that he must have the will in his possession.

Mr. *Heberden*, for the Defendant, argued that the answer was substantially sufficient, and that the De-

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fendant was not bound to set out documents relating to his own title.

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v.

SUTHERLAND.

*The MASTER of the ROLLS* allowed the exception, so far as regarded the documents relating to the Plaintiff's right, but disallowed it as to those relating to the Defendant's title.

## PATTERSON v. HUDDART.

June 10.

The word "estate," in a will, will *primæ facie* pass real estate, and the burthen of proof lies on those who contend the contrary.

A testatrix, after giving pecuniary and specific legacies, and after directing her charity legacies to be paid out of her personal estate, "gave and bequeathed" all the rest "of her estate and effects, whatsoever and wheresoever, and all her diamonds and other jewels," to trustees, their "executors and administrators," upon trust to sell and divide.

A TESTATRIX gave several pecuniary and specific legacies; and, after bequeathing jewels, and some legacies to charities payable out of her "personal estate," proceeded as follows:—

And as to all the rest, residue and remainder of my *estate* and effects, *whatsoever and wheresoever*, and all my diamonds and other jewels, not hereinbefore by me disposed of, *I give and bequeath* the same, and every part thereof, respectively, unto *Andrew Durham, William Talbot, Newgent Patterson and Richard Cooke, their executors and administrators*, "upon trust to sell, and pay and divide all the money arising from the sale and also all the rest, residue and remainder of my other monies, whatsoever and wheresoever," equally between my son and seven daughters, subject to an annuity of 20*l.* to *E. L.* for life.

The testatrix had a freehold house at *Bath*, and the question was whether it passed by the will.

Mr. *Hoare*, for the Plaintiffs. The word "estate" is sufficient

Held, that the real estate passed to them.

sufficient to pass freehold property, unless restrained by the context. Here, the testatrix had evidently her real estate in her mind, for she excludes it in the gift to charities, and she subsequently gave all the residue of "her estate," &c., "whatsoever and wheresoever," and this must necessarily include the house.

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Mr. Cotton, *contra*. The word "estate" does not necessarily pass real estate; *Sanderson v. Dobson* (a). Here the words of gift, "I give and bequeath," and the limitation of the property to the "executors and administrators," are properly applicable to personal estate only, and the word "estate" is so connected with the gift of personalty, as to include only things *ejusdem generis*; *Timewell v. Perkins* (b). In *Doe d. Spearing v. Buckner* (c), a testator said, as to my estate, real and personal, I dispose thereof in manner following. He gave legacies and proceeded:—All the residue, &c. "of my estate and effects, of any and what nature or kind soever, or wheresoever, I give and bequeath the same unto C. B. and J. R., their executors or administrators, in trust," &c. It was held, notwithstanding the introductory words, that the real estate of the testator did not pass under this clause. Again, in the case of *Doe d. Hurrell v. Hurrell* (d), a testator gave certain pecuniary legacies; and after payment thereof, and of his just debts, funeral, testamentary and incidental expenses, he gave and bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, unto A. and B., their executors and administrators and assigns, upon certain trusts. It was held, that notwithstanding the generality of the words, the nature of

(a) 1 Exch. Rep. 141.

(b) 2 Atk. 102.

(c) 6 T. R. 610.

(d) 5 Barn. &amp; Ald. 18.

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of the trust clearly showed that the testator meant to bequeath his personal property only.

*The MASTER of the ROLLS.*

I concur in the argument that the words in this will are quite sufficient to pass the real estate, and I think that the burthen of proof lies on the person who seeks to restrict the operation of the word "estate" to personalty only.

There are cases where an enumeration of personal chattels has been followed by the word "estate," and then the word has been considered to apply to estate *ejusdem generis* as that which precedes it, and has been restricted to personal estate. I have no doubt, however, that if a testator were to give a legacy of 100*l.* to *A. B.*, and all the residue of the estate and effects to trustees to sell and divide the produce, the will would carry all the real and personal estate, though the testator has not previously described any but personal estate.

The enumeration of chattels before the word "estate" does not affect my decision. The testatrix first enumerates certain specific chattels, and proceeds to give the rest "of her estate and effects, whatsoever and wheresoever." This would cover the whole of the real and personal estate. She then goes on, "all my diamonds and jewels," &c.; this was unnecessary, for they passed before, but these words do not therefore cut down the effect of the words previously used.

The testatrix well knew the difference between real and personal estate, for she directed her charity legacies to be paid out of her *personal estate*; and after that express

press direction, she gives all the residue "of her estate and effects." This shows that she had the distinction in her mind, and gives the natural and enlarged effect to the word "estate." I think she intended to dispose of all her estate in the fullest sense. She directs all her estate capable of being sold, to be sold and turned into money, and then she gives all the money to arise therefrom, and all her other monies, to her children. She gives nothing to her heirs or devisees; but this, though a material ingredient, is not sufficient to cut down the effect of the words, for if the will had simply given all her "estate and effects," it would necessarily have carried all her real and personal estate.

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NOTE.—See *Fullerton v. Martin*, V. C. K. (June 2, 1853.)

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WILLIAMS v. WILLIAMS.

ON the 13th of February, 1847, the Plaintiff, John Williams, who was owner of two houses, &c., subject to a mortgage thereon for 700*l.*, entered into a negotiation for the sale of them to the Defendants, Williams and Jones, to whom he was at that time indebted.

On June 10. Unless a valid acceptance be given, within a reasonable time, to a written offer to sell an estate, it will be treated as abandoned.

In 1827, A. wrote to B., that he had credited B.'s account with 220*l.*, in consideration of an agreement by B. to convey two houses. The abstract was delivered, but there was no acceptance in writing on the part of B. Five years afterwards, B. filed a bill against A. for specific performance. A. swore, and it was not denied, that in 1827 he abandoned the contract, and that in 1829 it was considered broken off by both parties. I appeared, however, that B. had, in the meantime, the benefit of the credit for 220*l.* The Court dismissed the bill on the ground of the delay.

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WILLIAMS  
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WILLIAMS.

On the 19th of *February*, 1847, *Williams* and *Jones* wrote to the Plaintiff in these words:—"We have credited your account in the sum of 220*l.*, in consideration of an agreement, that you will cause to be conveyed to us the equity of redemption in two houses, &c. (describing them), which two houses are subject to a mortgage of 700*l.* cash, from the 13th instant."

An abstract was furnished, in *February*, 1847, and a draft conveyance was sent in *April*, 1847.

On the 4th of *December*, 1852, *Williams*, the vendor, instituted this suit for the specific performance of the contract.

The bill alleged, that the Defendants, having accepted the title, and paid the purchase-money (by giving the Plaintiff credit for it in account), refused to take a conveyance, and to give an indemnity in respect of the mortgage of 700*l.*; and it prayed a specific performance.

The Defendants, by their answer, stated, that they had agreed to make the purchase, and pay the 220*l.*, provided it could be arranged, that the mortgage money should not be called in for seven years, which the Plaintiff said could be done. That the Plaintiff, however, having failed in obtaining such undertaking from the mortgagees, the Defendants abandoned all idea of the purchase. That in 1849, the negotiations were renewed, but in *July* of that year, the mortgagees having definitively refused to undertake not to call in the money, as was required, the bargain was thenceforth considered, by both parties, broken off, and nothing more occurred till 1851.

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*The* Plaintiff denied that he had said he could obtain an undertaking from the mortgagees, but he made no answer as to the alleged abandonment of the agreement.

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*Mr. Roupell*, and *Mr. Shebbeare*, contended, that the contract was complete, so soon as the Defendants had given the Plaintiff credit in their books for the 220*l.*; and as they had accepted the title, they ought to be compelled to take a conveyance.

*Mr. R. Palmer* appeared for the Defendants, and insisted, that there was not a sufficient signed contract within the Statute of Frauds, and that even if there were, still it had been abandoned by both parties, which was not denied by the Plaintiff. But even if the contract had not been abandoned, it was not consistent with the principles of a Court of Equity, to enforce it at the instance of the Plaintiff, after his great delay in accepting the offer: the effect of which would be, that the Plaintiff would be at liberty, all the time, to proceed with the contract or not, as he pleased, while the Defendants could not, however much they might desire it, enforce the agreement. The Plaintiff ought to have accepted the offer within a reasonable time.

*The MASTER of the ROLLS.*

In this case, time is a bar to the relief sought by the Plaintiff. The contract now sought to be specifically performed was entered into on the 19th of *February*, 1847. Various proceedings took place for the purpose of carrying it into effect, all of which ceased in the year 1847, and from that time down to the month of *December*, 1852 (a period of five years), no step is taken for the purpose of enforcing the contract.

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It is also material to observe, that this contract (though that would be no objection to it, if the bill to enforce it had been filed speedily after the execution of it) is a one-sided contract. It is a contract which the Plaintiff could enforce against the Defendants, but which the Defendants could by no means enforce against the Plaintiff. This makes the question of time of still greater importance. The owner of property may write and say, "I agree to sell you Whiteacre for 1,000*l*;" and if the person to whom the letter is sent accepts the offer, no doubt he could enforce that contract, but he must do so within a reasonable time, because, as the person making the offer cannot enforce it against the person to whom it is made, until it has been accepted by the latter, it is not only reasonable, but a clear principle of equity, that unless the offer be accepted and acted upon, within a reasonable space of time, it must be treated as abandoned. If this purchase had turned out to be an exceedingly profitable one to *Williams* and *Jones*, they could not, at any period of the time, have enforced it against the Plaintiff, he not having signed it. No blame, therefore, attaches to them, for having taken no step for that purpose.

But there are two circumstances, in this case, which are peculiar, and bear upon the question of time. The Defendants swear that the contract was finally abandoned and repudiated in the month of *July*, 1849, or rather was considered to be so by both parties: to that there is no answer on the part of the Plaintiff. On the other hand, the Plaintiff says, you gave me credit for the 220*l*. in your books, we have had various communications respecting accounts from that time to this, but the 220*l*. has all along remained to my credit in the account: that is not denied. So that there is  
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this peculiarity :—On the one side it is sworn that the contract was abandoned, which is not denied; and on the other side, it is said, credit was given to me for the purchase-money, which has remained so up to the present time.

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WILLIAMS  
v.  
WILLIAMS.

It appears to me, that I cannot, in consequence of either of these facts, vary equities which result from the lapse of time, and that the Plaintiff, although he may, from various causes, have obtained credit for this sum of money, cannot, after the length of time which he has permitted to elapse without taking any step to enforce the contract, now enforce it against Defendants, who, during the whole of that time, knew, that they could not have enforced it against the Plaintiff. I am, therefore, of opinion that this bill must be dismissed.

RATCLIFFE v. WINCH.

May 28.  
June 11.

**T**HE testator gave all his real and personal estate to his daughters *Mary Ratcliffe* and *Amy Winch*, in trust by and out of the proceeds to pay, amongst others, a legacy of 50*l.* to his son *John*, and divide the residue as therein mentioned.

The testator, after stating that he had lent his son "*Frederick*"

about a year after a testator's death, the executrix brought an action against a debtor and recovered judgment, but she did not issue execution until a year after, when a bankruptcy ensued and the debt was lost. The executrix was empowered "to compound or allow time for the payment of any debt." Held (under the particular circumstances), that she was not liable for a *devastavit*.

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"*Frederick Winch* several sums, which, except 600*l.*, he had forgiven, proceeded to direct, that the trustees and executors should allow *Frederick Winch* the period of six years to pay the same, without interest, provided he should liquidate such debt by instalments of not less than 50*l.* in each of the first five years of such period of six years, the first instalment to be paid at the expiration of twelve calendar months from the day of the testator's decease."

The testator appointed *Mary Ratcliffe* and *Amy Winch* his executrixes, and empowered them, notwithstanding anything therein contained to the contrary, to compound or allow time for the payment of any debt due to his estate, and to settle all accounts between him and any persons, on such terms as they, in their discretion, should think expedient, and to refer all matters in difference to arbitration.

The testator died on the 7th of *January*, 1850, and *Amy Winch* alone proved his will, the other executrix having renounced.

*Frederick Winch* had given a promissory note to the testator, dated 1st *January*, 1846, and towards the end of 1850, the solicitors of Miss *Winch* applied to him to renew it, which he refused to do, alleging that nothing was due to the testator's estate from him, but a large balance to him. On the 3rd of *January*, 1851, the executrix brought her action against him, which being undefended, she recovered judgment in *February*, 1851.

On the 7th of *January*, 1851, the first instalment of the 600*l.* became due, and application for payment was made to *Frederick Winch*, but he refused to pay; and thereupon the executrix required him to furnish the alleged

leged account, which she offered to submit to arbitration. On the 3rd of *August*, 1851, *Frederick Winch* submitted his account, extending over a period of thirty years, whereby, on the balance of accounts, he made the testator indebted to him; but, on investigation, it was found, that a few items only were admissible. An offer was, however, made to him, that if he paid the 50*l.* instalment then due, the account would be considered, and if legally possible, allowed.

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 WINCH.

After waiting some time, and nothing having been done, the executrix issued a *fi. fa.*, on the 15th of *January*, 1852, and the goods of *Frederick Winch* were taken in execution, and about to be sold, when a petition in bankruptcy, founded on his own voluntary declaration of bankruptcy, was presented, and he was declared a bankrupt, and the execution rendered ineffectual.

The executrix stated, that she knew the affairs of her brother *Frederick Winch*, who was a tailor at *Margate*, and that the value of his stock-in-trade, furniture, &c. did not exceed 250*l.* at any time; and the only way she hoped to get the 600*l.* paid was, by allowing it to be gradually liquidated; and that she had used due discretion in issuing the writ, and that if she had issued it sooner, the same result would have followed.

The solicitor of the executrix made a statement to the same effect; that he knew the circumstances, and that he was satisfied that *Frederick Winch* was unable to pay, otherwise than by small instalments, and that the same result would have taken place, if the *fi. fa.* had been sooner issued.

After this, *John Winch*, the legatee, proceeded in the  
 County

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County Court, to recover his 50*l.* legacy, suggesting a *devastavit*, and seeking to charge the executrix *de bonis propriis*; but an order having been obtained for the administration of the testator's estate, an injunction was granted on the 12th of *March*, 1853 (*a*), to restrain the proceedings of *John Winch*, with liberty to him to come in and prove in this suit.

*John Winch* now insisted, that *Amy Winch*, the executrix, was liable for a *devastavit* in not having taken more effectual steps for obtaining payment of the sums due to the testator's estate from *Frederick Winch*.

Mr. *R. Palmer* and Mr. *Tripp*, on behalf of *John Winch*, contended, that the delay of a whole year in issuing execution, at the end of which *Frederick Winch* had become bankrupt, constituted such wilful default as amounted to a *devastavit*. They submitted, that, at all events, they were entitled to an inquiry.

They cited *Tebbs v. Carpenter* (*b*); *Moyle v. Moyle* (*c*); *Clough v. Bond* (*d*); *Stiles v. Guy* (*e*).

Mr. *Roupell* and Mr. *Speed*, *contra*, insisted, that the executrix, who knew that her brother was in necessitous circumstances, and that his business at *Margate* was but small, had very prudently exercised the discretion given her by the will, in abstaining from taking out execution. They cited *Buxton v. Buxton* (*f*).

*The*

(*a*) 16 *Beav.* 576.

(*b*) 1 *Madd.* 290.

(*c*) 2 *Russ. & M.* 710.

(*d*) 3 *Myl. & Cr.* 490.

(*e*) 16 *Sim.* 230; S. C. 4 *Y. & Coll. (Exch.)* 571; 1 *Macn.*

& *Gor.* 422; 1 *Hall & Tw.* 523.

(*f*) 1 *Myl. & C.* 80.

*The* MASTER of the ROLLS.

I **w**ill look at the affidavits.

1853.

RATCLIFFE  
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*The* MASTER of the ROLLS held, that the executrix was **not** liable for a *devastavit*, and that no inquiry ought to be directed. June 11.

LEWIS v. LEWIS.

June 21.

**T**HE testator, *Edward Lewis*, bequeathed all his worldly effects and his freehold property to his wife *Margaret*, during her life, and after her demise to his sister, *Charlotte Taylor*. And, if she should have any family living after her demise, that when they came to the age of twenty, he or she (whoever it might be) should have *their due proportion* of the same property, either funds or houses. And in case of the demise of his sister's children, then his will was, that *George* and *Edward Lewis* (his nephews) should stand in the same situation as his sister's children would, supposing they had lived.

A testator gave his real and personal estate to his sister for life, and if she should have any family living at her decease, they should have "their due proportion of the property;" and in case of the demise of his sister's children, his two nephews were to stand in the same situation as his sister's children would have stood had they been living. Held, that such only of the nephews as survived the sister and the children took, and one of the nephews having died in her lifetime, that the other nephew was entitled to the whole residue.

The wife, the sister *Charlotte*, her two children, and the two nephews, survived the testator. *Charlotte Taylor* survived her two children and *Edward Lewis*. She had died, but *Margaret Lewis*, the widow, and *George Lewis*, the surviving nephew, were still living; and the principal question was, whether *George Lewis* was entitled, in reversion expectant on the death of the testator's widow, to the whole of the property or to one-half.

*Mr. Campbell* and *Mr. Wright*, for the Plaintiff, con-  
tended

1853.

LEWIS

v.

LEWIS.

tended, that, as the nephews were to stand in the same situation as the children of the testator's sister *Charlotte*, if living, would have stood, and as such of the children only would be entitled as survived the sister, the Plaintiff, who alone survived her, was entitled to the whole.

Mr. *Erskine*, for the administrator of *Edward Lewis*. The children were to have their "due proportion," and were tenants in common, and so were the nephews, who were substituted in their place, and had vested interests. The Plaintiff, therefore, is only entitled to half.

*The MASTER of the ROLLS.*

The case is not very clear. The children of the testator's sister took nothing, unless they survived *Charlotte Taylor*, their mother (for it is given to the children "living after her demise"), and the testator's nephews were to stand in the same situation as the children, in case of their demise. It follows that the nephews must be held to take as the children would have taken. If this be so, then, to entitle *George* and *Edward Lewis* to take, they must survive *Charlotte Taylor*; and *George* therefore, who alone survived her, takes the whole.

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1853.

JOHNSON v. SMILEY.

May 21.

June 22.

**T**HIS case came on upon exceptions to the Master's report, finding that a good title could not be made to certain copyholds, sold by the Plaintiffs to the Defendants under the following circumstances :—

On the 10th of *February*, 1832, a fiat in bankruptcy issued against *William Rowland Gladwin*, and he was declared a bankrupt.

At the time of his bankruptcy, a copyhold estate, held of the manor of *Nettleswell Bury*, was vested in his father for life, with remainder in tail to the bankrupt. The father had, in *March*, 1827, been admitted tenant for life. One of the customs of the manor was, that no person, not having an interest in the property in possession, could levy a fine or create a base fee. In *August*, 1832, the bankrupt obtained his certificate.

Afterwards, the assignees, being advised that the bankrupt's interest in the copyhold estate, so far as the same could by them be made available, consisted of a reversionary life estate expectant on the death of his father, the tenant for life, sold, and by indenture of bargain and sale, dated 30th of *November*, 1832, duly conveyed

A tenant in tail in remainder of copyholds became bankrupt, and by the custom, the entail could not be barred until it fell into possession. The bankrupt obtained his certificate, and purchased of his assignees his life estate only. On the subsequent death of the tenant for life, held, that the assignees had then no power to bar the entail and acquire the remainder in fee, subject to the life estate sold to the bankrupt.

If conditions of sale simply state the facts, and stipulate, that the purchaser shall take such title or such interest as the circum-

stances detailed would confer upon him and no other, the purchaser must accept it, whatever it may be; but if they go on to state, not as a conclusion of law from the circumstances detailed, but as a positive fact, that the vendors have power to sell the fee, the purchaser is not precluded from inquiring whether the vendors have anything to sell, as their power so to do may have arisen from separate and independent sources.

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his reversionary life estate in the premises to the bankrupt himself.

In *February*, 1846, the tenant for life died, and thereupon the bankrupt was admitted to the copyhold estate, as tenant in tail (in error, as was alleged, instead of as tenant for life) under the bargain and sale. He afterwards surrendered the premises to the use of himself in fee, for the purpose of barring the estate tail, and he was subsequently admitted as tenant in fee.

On the 4th of *November*, 1851, the assignees, not being aware of what had been done by the bankrupt, and under an impression that they had a right so to do by virtue of the 65th section of the 6 *Geo.* 4, c. 16, and the Fines and Recoveries Abolition Act, 3 & 4 *Will.* 4, c. 74, ss. 56 to 63, put up the estate for sale by public auction, as a reversionary estate, subject to the life estate of the bankrupt, acquired by him under the bargain and sale from them.

The 4th condition of sale stated, that the testator in 1823 devised the copyhold premises to his son, *William Gladwin*, for life, with remainder to his grandson, *William Rowland Gladwin* (the bankrupt), and the heirs of his body; that the testator died in *November*, 1827, and that *William Gladwin* was in 1827 admitted as tenant for life, under the will, and died in 1846; that *William Rowland Gladwin* became bankrupt, and the assignees sold and conveyed the same premises for his life, and that on the 29th of *July*, 1846, he was admitted tenant in tail in error, instead of tenant for life, and that the assignees or the Commissioners, having power to bar the entail and all reversions and remainders over, and to sell the reversion in fee, now proposed to sell the customary fee, expectant on that life. The 6th condition of sale stated, that the bankrupt would probably not consent to the sale.

The

The Defendants *Smiley* and *Southall* purchased the premises for 460*l.*, but on investigation, they insisted that a good title was not shown, and refused to complete. The Plaintiffs filed their bill for specific performance of the contract, and the Master having found that a good title could not be made, exceptions were taken to the report, which now came on to be argued.

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Mr. *R. Palmer* and Mr. *Shapter*, for the Plaintiffs, in support of the exceptions. By virtue of the 65th section of the statute 6 *Geo.* 4, c. 16, the estate tail of the bankrupt, and the right to bar it, together with the remainders over, became vested in the assignees, and that estate tail might then have been barred, together with the remainders over, with the consent of the tenant for life while living. On his death, the estate tail, and that potential, incipient, or inchoate right fell into possession and might have been exercised, and the absolute interest acquired, notwithstanding the tenant for life died subsequently to the bankrupt's obtaining his certificate; *Ripley v. Woods* (a); *Higden v. Williamson* (b); *Spooner v. Payne* (c). Can it make any difference that the bankrupt had bought up an estate during his own life? He could not, by any act of his own, derogate from the interest or powers of his assignees; *Badham v. Mee* (d); *Jones v. Winwood* (e); *Hole v. Escott* (f); *Doe d. Coleman v. Britain* (g). As the fiat issued before 1834, the proceeding will not be under the 208th and 209th sections of "the Bankrupt Law Consolidation Act, 1849," for that act only re-enacts the clauses of the statute 3 & 4 *Will.* 4, c. 74 (The Fines and Recoveries Abolition Act),

(a) 2 *Sim.* 165.

(b) 3 *P. Wms.* 132.

(c) 1 *De G. M. & G.* 383.

(d) 1 *Myl. & K.* 32; 7 *Bing.* 695; 1 *Moo. & Sc.* 14.

(e) 10 *Sim.* 150; 3 *Mee. & W.* 653.

(f) 4 *Myl. & Cr.* 187; 2 *Keen,* 444.

(g) 2 *Barn. & Ald.* 93.

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Act), with respect to estates tail and base fees of bankrupts, and these clauses do not apply to a bankruptcy anterior to 1834. But the 6 *Geo.* 4, c. 16, s. 65, which is not repealed by the Consolidation Act, so far as regards previously vested rights, or with respect to the completion of proceedings under existing bankruptcies (*a*), enables the Commissioners to make a sale of the remainder in fee.

Mr. *Elmsley* and Mr. *Henry Stevens*, *contra*. All that the assignees could dispose of was, that which the bankrupt himself could have alienated, if he had not become bankrupt. There being no custom to bar an entail of the copyholds of this particular manor, by any method corresponding to a fine, the only way to effect that object would be by means of the concurrence of the tenant for life, in a manner analogous to the statutory mode. All the bankrupt could convey was his life estate, or at most a base fee. An estate for his life alone was vested in him at the time of the bankruptcy, and this passed to the assignees; but the estate tail being in remainder, his issue could not be barred nor could the estate tail be turned into a base fee, either by the custom of the manor, which only admitted of estates tail in possession being barred, or by the Bankrupt Act, unless with the consent of the tenant for life. It therefore was not affected by the provisions of the bankrupt laws, at the time of the bankruptcy; and when, on the death of the tenant for life, the estate tail actually fell into possession, the bankrupt had obtained his certificate and purchased his life estate, and therefore became entitled in his own right and for his own benefit. All that the Commissioners could dispose of to a purchaser was that only which the bankrupt

(*a*) See sects. 1, 4.

bankrupt had vested in him at the time of his bankruptcy, or which came to him before he obtained his certificate.

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The object of the bankrupt law was, not to take anything from the issue in tail, which the bankrupt himself could not have deprived them of at the time of his bankruptcy; and after the bankrupt had obtained his certificate, the Commissioners could take nothing which had not come to him previously. *Ripley v. Woods* and *Higden v. Williamson* have no application to the present case, for the former was a case of an absolute vested remainder in personalty, after a life estate, and the latter was a case of a contingent interest or a possibility, which the bankrupt himself might have released, and which therefore was assignable by the Commissioners. In *Jervis v. Tayleur* (a), a joint commission having issued against A., tenant for life, and B., tenant in tail male, it was held, that the assignees only took an estate in the premises for the life of A., and a base fee, determinable on the death of B. and failure of issue male of his body.

But it is said, that the purchaser is precluded by the 4th condition of sale from taking this objection, and that, as the vendors only professed to give him such title as they had, he is bound to take it, especially as he bought the property for a less price on that account. That however is the vendors' conclusion of law, on the facts, as stated in the conditions of sale. Nothing is said therein as to the purchaser taking such interest as the vendors have; on the contrary, it is stated as a positive fact, that the assignees or the Commissioners have power to bar the entail and all reversions and remainders over, and to sell the reversion in fee, and, therefore, the purchaser has

(a) 3 B. & Ald. 557.

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has a right to examine and see whether they have or have not anything to sell, and to require the facts stated to be proved.

*The MASTER of the ROLLS.*

There arise two questions on the exceptions; the first is, whether a valid objection is made by the purchaser to the title; and secondly, if it be, whether he is or not precluded, by the conditions of sale, from taking that objection.

The question of title is, in my opinion, one of considerable nicety. The facts which raise it are these:—  
[*His Honor stated them.*]

On behalf of the vendors, it is contended, that this falls within the provisions of the 65th section of the Bankrupt Act, which provides that the Commissioners shall, by deed enrolled, make sale, for the benefit of the creditors, of any lands, &c. whereof the bankrupt is seised of any estate tail, in possession, reversion or remainder, and every such deed shall be good against the bankrupt and the issue of his body, and against all persons claiming under him and all persons whom the bankrupt might cut off from any remainder, &c. I am of opinion, that this section confines the power of the Commissioners to make sale of that, which the bankrupt could himself have made sale of at any time prior to the time of his obtaining his certificate. This appears to me to be the plain meaning of the words of the section itself, and I have been referred to no case, nor am I myself aware of any, which contradicts this construction of this clause of the statute. It is confirmed also by the clauses to which I was referred, from 60 to 66 of the statute of 3 & 4 Will. 4, c. 74, for amending the law relating to fines and recoveries.

Both

**Both** upon principle and authority, the property that comes to the bankrupt, or rather the right to property which vests in the bankrupt, subsequently to his obtaining his certificate, does not pass to the Commissioners or to the assignees.

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It has been contended that there may be an inchoate right in the bankrupt, before the certificate, which is made perfect by the accruer of a right to him subsequently to the date of the certificate, which will vest the property in the assignees, and that there was such an inchoate right in this case, made perfect by the death of the father subsequently, which enables the assignees, under this section, to dispose of all that the bankrupt could now dispose of, less that which the assignees have already sold.

The cases of *Ripley v. Woods* and *Higden v. Williamson* are cited to establish this proposition, but, in my opinion, they fail in doing so. In the case of *Ripley v. Woods*, the bankrupt had the possibility of becoming entitled in possession to one-fourth of the residue of a testator's estate, which was given in reversion to his wife. He might have sold this interest, such as it was, before his bankruptcy; and if he had done so, the purchaser would have bought a mere chance, for if the husband had died before the interest of his wife became vested in possession, the purchaser would have got nothing by his purchase. But if the husband survived the wife (as was the case in that instance), the purchaser would have obtained the one-fourth of the residue.

*Higden v. Williamson* is similar to it. An estate was there devised to a woman for life, and after her death to be sold, and the proceeds to be divided amongst such of her children as should be then alive. This was  
a possibility

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a possibility which the child who became bankrupt might have sold or released; it required no further act of his to realise it. The purchaser took a mere chance, which might or might not become profitable; but in both these cases, there were existing interests at the date of the bankruptcy, which vested in the assignees by the conveyance of the Commissioners, which if they did not dispose of by sale, they might realize when the possibility turned out to be a reality.

In this case, I have to consider, what there was which vested in the assignees pending the bankruptcy, that is, prior to and before the bankrupt obtained his certificate. Under the 65th section, my opinion is, as I have already stated, that everything vested in them which the bankrupt could then have disposed of if he had not been bankrupt. But in saying this, I wish to distinguish or to define, more correctly, in what sense I use the words "could have disposed of." In one sense, a man may validly dispose of property which is not his; for instance, he may enter into a covenant, for value, to convey to the covenantee every species of property which might thereafter be bequeathed or devised to him by any stranger, and which he had not, at the time of entering into the covenant, any knowledge of or any expectation of receiving. This is not an unusual provision in marriage settlements, but this clearly is not an interest which can pass to the assignees. The chance of receiving a legacy from a relative a man might sell before his bankruptcy, but still, if not sold by him, that chance would not pass to his assignees. No doubt, if, before he obtained his certificate, the relation had died leaving the legacy to the bankrupt, the right to it would vest in the assignees, and this even though the legacy should be a mere possibility. When, therefore, I speak of an interest which the bankrupt could dispose of, I mean an existing interest

terest, whether vested or contingent, and which, if conveyed or released and assigned by him, requires no further act, on the part of the bankrupt, to vest it in the purchaser.

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It remains then here to be considered, what was there vested in the bankrupt, which, previously to the date of his certificate, he could, in that sense, have disposed of. If the property in question had been freehold, what the bankrupt could have disposed of during the life of his father would have been a base fee and no more, and that interest would have passed to his assignees, as is shown by the case of *Jervis v. Taylor* (a).

In this case, however, the property is copyhold, part of the manor of *Netteswell Bury*; one of the customs of which manor is, to prohibit the levying of a fine, and the creation of a base fee, by any one not in possession of the property. The bankrupt, I apprehend, was clearly bound by this custom, which is not alleged to be illegal. The bankrupt, therefore, could not have disposed of the base fee in these copyholds. The assignees are bound, equally with the bankrupt, by the custom of the manor of which the copyholds are held, and the act of Parliament gives them no right or power, superior to or independent of those, which the bankrupt himself could have possessed.

I am of opinion, therefore, that the whole of that which the bankrupt could have disposed of, during his father's life, was his own life estate dependent on the life estate of his father; and, accordingly, this was all that the assignees attempted to dispose of during that time.

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(a) 3 Barn. & Ald. 557.

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The death of the father, being subsequent to the certificate, has not, in my view of the case, conferred any right or interest on the assignees. The case must be viewed in the same light, and the effect must be the same, whether the estate of the bankrupt was purchased by a stranger, or by the bankrupt himself. After he had obtained his certificate, he was, for all practical purposes, a stranger, and any subsequently acquired property did not pass to his assignees. Looking at it in this point of view, the case presents no difficulty, if all that the bankrupt could have disposed of, during his father's life, was his own reversionary life estate; and if that had been sold by the assignees to a stranger, what would there now be in the bankrupt which could be properly claimed by the assignees? In my opinion, nothing. The bankrupt would have in him an estate tail in remainder, and the power of creating a base fee, if the custom of the manor had not interfered; but this power and the interest to which this power is incidental, accrued to him subsequently to his obtaining his certificate, and it would not have been released by the bankrupt during his father's life, or bound, except by covenant or something requiring further acts on his part, to substantiate the sale and make the interest complete.

This result is not altered by the circumstance, that the bankrupt has become the purchaser of his own life interest, and that by reason of his life interest merging in the estate tail in remainder, to which he is entitled, he may have become tenant in tail in possession. It is said, no doubt accurately, by Mr. *Shapter*, that the bankrupt cannot, by any act of his, derogate from the estate of the assignees; but that observation does not, in my opinion, apply to this case. The bankrupt does not, by any act of his, derogate from or affect the estate of the assignees, but the question is, whether, since the granting

granting of his certificate, the bankrupt has not acquired this property, and whether this can be claimed by his assignees? I am of opinion, for the reasons I have stated, that it cannot be so claimed, and that they cannot make a good title to these copyholds, and that, in truth, they have no estate or interest therein.

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The next question is, whether the Defendant is precluded by the conditions of sale from taking this objection. The conditions of sale, so far as they are material to this question, are these:— [*His Honor read them.*]

I am of opinion that this does not preclude the purchaser from taking this objection. If the assignees had simply stated the facts, and had gone on to say, that the purchaser shall take such title and such interest as these circumstances might confer upon them and no other, then I should have been disposed to come to the conclusion, that the purchaser would have been bound to take the title, such as it was; but this condition states these facts, and it also states, as a positive fact, that the bankrupt has been admitted, in error, as tenant in tail, instead of tenant for life, and that the assignees or the Commissioners have power to bar the entail and all reversions and remainders over, and to sell the reversion in fee. This is not stated as a conclusion of law, from the preceding circumstances, but is stated as a positive and distinct fact; and although notice is given, that *William Rowland Gladwin* will, probably, not consent, and although, therefore, it may be a matter of surprise, that any one should have bid 460*l.* for what was clearly the purchase of a law suit, still, I am of opinion, that the positive averment of the right of the vendors to sell, which right might have arisen from separate and independent sources, entitles the purchaser to examine into the

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the question whether they had anything to sell or not, although the facts are so detailed; and I am of opinion, that the assignees had nothing in them which they could sell, and, consequently, that the Master was right, and that the exceptions must be overruled.

May 31.

## JENNINGS v. BROUGHTON.

June, 3, 6, 22.

Upon the formation of a company, the directors, and the persons who take shares, are contracting parties, and the prospectus and advertisements issued by the directors are the representations "quædant locum contractui." If these be false, and cannot be made good by the persons making them, the contract may be

THE Plaintiff, who had taken 719 shares in a Mining Company, filed this bill against *Richard* and *Robert Broughton* and *Thomas Bebb*, to set aside the contract, on the ground that he had been induced to take the shares by the false representations of the character and value of this mine, contained in the prospectus and report of the Defendants' surveyor, and which was published to the world by the authority and with the sanction of the Defendants.

The mine was situate on a hill called *Craig-y-Mwyn* (The Hill of Lead), in *Montgomeryshire*, the property of the Earl *Powys*. It was in the neighbourhood of a very profitable lead mine, and had long been supposed

avoided. It has, however, to be considered, whether it is reasonable to believe, that if the real truth had been stated, the shares would not have been taken.

In suits to set aside contracts on the ground of misrepresentation, the burthen lies on the Plaintiff of proving that the representations were false, and that he acted on the faith of them.

Upon a bill, by a shareholder against the projectors and lessees of a mining company, to rescind the contract and return the shares, on the ground of misrepresentation in the prospectus, held, upon the evidence, that although it stated, in glowing and exaggerated colours, what was really in the mine, yet these were not such misrepresentations as to avoid the contract. Held, also, that the same sources of information were open to the Plaintiff and Defendant, and that they availed themselves of them, and the bill was dismissed with costs.

Observations as to the doubtful and speculative character of mining operations.

posed to contain lead ore, which might be advantageously worked. Repeated attempts had, on no large scale, been made by the former lessees of the Earl of *Powys* to make this mine productive, but hitherto without success.

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In the year 1843, the present Defendants obtained a take-note from the Earl of *Powys*, and they employed an engineer to inspect and report on the mine. He made his report in *April*, 1843, which was of a very favourable character. The Defendants acted on his suggestions to some extent; they employed men to work at the mine, rather to examine the state of it and to clear out the levels than to begin any serious and effective working of it, and they began to drive the level as recommended. They adopted this course, apparently with a view of forming a company, when they should be in a state sufficiently advanced to be able to form a correct estimate of the probable value of the mine, and they continued to proceed in this course till the middle of the year 1850, and in so doing they spent several hundred pounds. In *June* of that year, they obtained, from the Earl of *Powys*, a lease for twenty-one years of the mine, by which they were to pay a royalty of one-tenth of all the ore raised. Having so done, and with a view of issuing prospectuses, in order to form the company, they employed Mr. *Bell Williams*, a surveyor and land-agent, to examine the mine. He made his report in the month of *August*, 1850. In *September* the advertisements for the formation of the company were published, and Mr. *Bell Williams's* report was printed and circulated. In the same month of *September*, the Plaintiff visited the mine, in company with the Defendant, *Richard Broughton*. The Plaintiff read these advertisements, and the report of Mr. *Bell Williams*, and applied to take shares in the proposed company

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pany. On the 12th of *October*, 1850, he attended a meeting for the purpose of settling the plan on which the company was to be established; and he took an active part in settling the draft of the minute of the meeting, and of the rules of the company. At this meeting the Plaintiff took 250 shares, at 8*l.* each, and the Defendants, and Mr. *Bell Williams*, took other shares, making together 960, out of the 1,600 shares of which the company was to consist.

On the 1st of *November* following, the Plaintiff again visited the mine, in company with the Defendants, *Robert Broughton*, and *Bebby*, and he proceeded to examine it in their presence, and in that of *Edward Hampson*, the captain of the mine; and on this occasion *Thomas Hampson*, one of the miners working in it, raised ore there, in the presence of the Plaintiff, for the purpose of his examination. Both the *Hampsons*, and other witnesses, spoke of the mine as being, at the time of this second visit, in a very promising state and appearance. The Plaintiff, on his return, took 464 additional shares at the same price, and on the 5th of *January* following, he took five more shares, making in the whole 719 shares.

In *April* following, the Plaintiff became doubtful as to the success of the adventure; he employed an engineer to examine the mine, and it was afterwards examined by engineers of eminence on both sides. Their opinions and testimony were conflicting. On the one side, it was said, that the report of Mr. *Bell Williams* was incorrect, in various essential particulars, and that the speculation was an utter failure, but, on the other side, the contrary was as positively asserted. The reports, however, of the produce of the mine, up to the present

present time, showed it to be a very unprofitable speculation.

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The Plaintiff, insisting that there had been a misrepresentation in the advertisement and in the report of Mr. *Bell Williams*, on the faith of which (as he alleged) he had taken his shares, filed this bill, in *October*, 1851, against *Richard* and *Robert Broughton*, and *Bebby*, praying, in effect, a declaration that the sales of the shares had been obtained through the misrepresentations of the Defendants, and that they might be decreed to repay the Plaintiff the purchase-money and the calls paid by him, the Plaintiff offering to re-transfer the shares.

The specific misrepresentations alleged by the Plaintiff were:—*First*, that the advertisement and report stated, that the vein of lead ore, in level No. 3, was two feet wide. *Secondly*, that it had been proved to be so for ten fathoms. *Thirdly*, that “the lead on bank” was about fifty tons, and would be available for a first dividend to the shareholders joining during that month. *Fourthly*, that the level No. 1 was capable of yielding sixty tons of ore in a distance of ninety yards. *Fifthly*, that the slate quarries belonging to the property were of a very valuable description, and would add to the success of the speculation; and, *Sixthly*, they complained that the general description of the mine was untrue and exaggerated.

Mr. *Willcock*, Mr. *W. M. James* and Mr. *Harrison*, for the Plaintiff.

Mr. *R. Palmer*, Mr. *Giffard*, and Mr. *Kenyon*, for the Defendants.

The

1853. The following cases were relied on, *Pawson v. Wat-*  
  
 JENNINGS *son (a); Cornfoot v. Fowke (b); Pasley v. Freeman (c);*  
 v. *Fuller v. Wilson (d); Adamson v. Jarvis (e); 1 Story,*  
 BROUGHTON. *Eq. Jur. (f); Hichens v. Congreve (g); Burrowes v.*  
*Lock (h); Ainslie v. Medlycott (i); Dent v. Bennett (k);*  
*Hunter v. Atkins (l); Attwood v. Small (m); Pulsford*  
*v. Richards (n); Edwards v. M'Leay (o); Reynell v.*  
*Sprye (p); Burnes v. Pennell (q).*

*The MASTER of the ROLLS* reserved his judgment.

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June 22. *The MASTER of the ROLLS* (after a short outline of the case, proceeded).

In this case I repeat the observations I made in *Pulsford v. Richards (n)*, that I entertain no doubt, that persons who take shares upon the formation of a company, and the directors who form it, are contracting parties, and that the prospectus and advertisements issued by the directors are the representations, "*quæ dant locum contractui*." If these representations contain false statements, which cannot be made good by the persons who made them, the person who took those shares, on the faith of them, may, in my opinion, avoid the contract, and require the founders of the company to restore him to the position he was in when he took these

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|--------------------------------------------|-----------------------------------------------|
| (a) <i>Cowp.</i> 785.                      | (k) 7 <i>Sim.</i> 539; 4 <i>Myl. &amp; C.</i> |
| (b) 6 <i>Mee. &amp; W.</i> 358.            | 269.                                          |
| (c) 3 <i>Term Rep.</i> 51.                 | (l) 3 <i>Myl. &amp; K.</i> 113.               |
| (d) 3 <i>Q. B. Rep.</i> 58.                | (m) <i>Younge</i> , 407, 461, 537;            |
| (e) 4 <i>Bing.</i> 66.                     | 6 <i>Cl. &amp; Fin.</i> 232, 442.             |
| (f) <i>Sect.</i> 193, p. 166, 2nd ed.      | (n) <i>Ante</i> , p. 87.                      |
| (g) 4 <i>Sim.</i> 420; 4 <i>Russ.</i> 562. | (o) <i>G. Cooper</i> , 308; 2 <i>Swanst.</i>  |
| (h) 10 <i>Ves.</i> 470.                    | 287.                                          |
| (i) 9 <i>Ves.</i> 13.                      | (p) 1 <i>De Gex, M. &amp; Gor.</i> 656.       |
|                                            | (q) 2 <i>H. L. Cas.</i> 497.                  |

these shares. To apply what I said in that case to the present, what I have first to consider is this:—whether the prospectus and advertisements, so issued, contained such misrepresentation, or such suppression of existing facts, as, if the real truth had been stated, it is reasonable to believe, that the Plaintiff would not have entered into the contract; that is, that he would not have taken the shares which were originally allotted to him and those which he purchased in the course of that year. But even if this should be determined in the affirmative, it will not be conclusive in the Plaintiff's favour, because, if the Plaintiff knew what the circumstances connected with the mine really were, and was cognizant of the fact that these representations were inaccurate, he cannot afterwards complain. And it is always to be borne in mind, in suits of this nature, that the burthen of proving that the representations were false, and that he acted on the faith of them, lies upon the Plaintiff.

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A perusal of the evidence in this case confirms an observation I made in the course of the argument, that, in my opinion, the Defendants are bound by the representations made by Mr. *Bell Williams*, in his report and in the advertisements issued by him. I am of opinion that, in these respects, he acted as the agent of the Defendants, the lessees, and that they sanctioned and approved of what he did.

In considering the effect of these documents, a distinction must be taken between that part of them which gives a general description of the prospects and capabilities of the mine, and that part which gives a specific account of what is to be there seen. With respect to the former, it is fit to observe, that the working of a mine is essentially a speculation of a doubtful character;

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character; that the most promising-looking mine may shortly become unproductive, that the most unfavourable appearances in a mine may rapidly disappear; and; further, that this character is more prevalent in mines of lead, copper and tin, than in those of coal and iron stone.

The specific misrepresentations alleged by the Plaintiff may be thus divided—[*His Honor here stated them (a), and having examined the evidence on the first and second points proceeded*].

As to the first and second of these statements, I am of opinion, upon this evidence, that the Plaintiff has failed in showing this statement, as to the width and continuation of the vein, to have been a misrepresentation. If I were compelled to come to a precise conclusion on the subject I should believe, that the report was accurate at the time it was made, although the subsequent workings have removed it, and have shown that the promises it held out were fallacious.

With respect to the third, viz. the account of the ore on the bank, it was undoubtedly inaccurate, for it turns out to consist of barely ten tons. But the Plaintiff cannot complain of this, because, before he took the shares, he knew that the account of the ore on the bank had never been ascertained, and that fifty tons greatly exceeded the amount of it, inasmuch as this question was discussed at the meeting of 12th of *October*, 1850, at which the ore on the bank was estimated, at a rough guess, as twenty tons and no more, and set down for at that amount, in the presence of the Plaintiff and before he took any shares.

With

(a) See *ante*, p. 237.

With respect to the fourth statement, I am of opinion, that ~~the~~ account in the report is not, that the level, No. 1, is capable of producing sixty tons of ore in a distance of ninety yards, but that it is an allegation, that ~~the~~ level there described has been driven through ore, ~~w~~hich, in the course of that operation, yielded that amount of ore, and this fact is proved in the evidence in the cause, although it took place before the Defendants ~~had~~ any concern in the mine.

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With regard to the fifth misrepresentation, the slate quarries are, undoubtedly, with the present means of transit, worth nothing. But I am of opinion, that the Plaintiff cannot complain of this statement, because it is established in evidence, that before he took his shares the Defendant *Bebby* stated, that in his opinion they were worth little or nothing, and because it is clear to me, on the evidence, that in fact they did not form the material grounds of the adventure, and that the Plaintiff relied upon the prospects which were held out with regard to the lead expected to be found in the mine.

I have already disposed of the statement respecting the general appearance and promise of the mine, by the observations I have already made with respect to adventures of this nature; and the result of the whole evidence is, that, in my opinion, that report stated, in the most favourable manner, and, it may be said, in glowing and exaggerated colours, what really was to be found in the mine, but I cannot find such representations as would entitle the Plaintiff to avoid the contract he has entered into.

Upon the most careful review I am able to form of the whole subject and the evidence, it appears to me, that the same sources of information were open to the

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Plaintiff and the Defendants, and that they alike availed themselves of the same means of obtaining their information. The Plaintiff paid two visits to the mine, one before he took any shares, and the other before he took the latter and larger portion; and although I consider that the mere inspection of a mine, by an unscientific person, amounts to little or nothing, yet, in this case, the result of the evidence satisfies me, that he carefully inquired, from the persons competent to give him correct information as to the state of the lodes, and that he examined them himself to ascertain their accuracy. If indeed an ignorant person went into a mine for the purpose of ascertaining the correctness of the appearance alleged to exist, and was shown something which he was told to be ore, which in truth was not so, I should regard it only as an additional badge of fraud; but if he was told the truth, he had in fact an opportunity personally of testing the correctness of the representations made. I think, on the evidence, he went there for this purpose, and that the information given to him by the miners and others, on these visits, was accurate, and that if he was deceived thereby it was by himself drawing false and exaggerated inferences from the information he so obtained. I am of opinion that he founded his conduct in taking shares, as much upon that information, so obtained in the mine, as upon the statements contained in the report and advertisements. This opinion is confirmed by what occurred on the 1st *November*, 1850, on the occasion of his second visit. At that time the mine looked very favourable. One of the men then at work raised a large piece of ore in his presence, and he was so satisfied with the prospects of the concern, that he forthwith procured all the additional shares he could in the concern, unsolicited by any one, without any fresh information, other than that which he obtained from the captain of the mine and the

the men at work therein, on the occasion of this second visit.

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I see no evidence of *mala fides* or fraud on the part of the Defendants. They knew, apparently, as little of the mine as he did; they were desirous to enter into a speculation to work this mine, and no doubt, at the same time, to make the most of the lease they had obtained from Lord *Powys*. They did not sell the whole concern; they retained three-eighths of the whole interest and the entire control of the working it, and they and the Plaintiff were so satisfied with the probable success of it, that in *January*, 1851, they refused to part with any shares, although a considerable premium was offered to induce them so to do. Mr. *Bell Williams* also showed that he believed in the accuracy of the report he had made, by himself accepting shares in the concern.

The previous workings of the Defendants I have already disposed of in my preliminary observations. If it had been shown, that the Defendants had worked the mine unprofitably for several years, and then finding that no profit could be derived from it, had determined to make it profitable, by getting up a sort of bubble company, the case would have borne a very different aspect. The previous workings of the Defendants were, I am satisfied on the evidence, only sufficient to enable them to examine and test the levels and veins, and to put it in a state in which it might be worked, and that their plan, from the beginning, was to work it by a company, in which they were to have a large interest, and over which they were to have the control, and that the previous workings were made only with a view to get the mine into such a state that it might be worked by a company, to be brought out for that purpose.

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The real state of the case I believe to be, that the Plaintiff embarked in this scheme with his eyes open, knowing all that was then to be known, but with an exaggerated and undue expectation of success, and that he has now fallen into the opposite extreme. In adventures of this description, so little can ever be accurately known of the future produce of the mine, that the expectations of success probably, in a great degree, depend on the temperament of the person who engages in them, and most persons are apt to believe, that the present appearances will continue, whether for good or evil.

But reviewing the whole matter, as carefully and as attentively as I can, I entertain no doubt, that the Plaintiff did not embark in this speculation, in consequence of or on the faith of any misrepresentation made by the Defendants, respecting the character of this mine and the probable chances of success in working it.

The result therefore is, that the bill must be dismissed, and with costs.

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NOTE.—Affirmed, upon appeal, by the Lords Justices, *March 30*, 1854.

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## GOSLING v. TOWNSHEND.

June 22.

**T**HE testator devised all his freehold, leasehold and copyhold and personal estates to three trustees, upon trust to sell and convert the same into money, and pay, apply and divide the monies to arise by such sale into three equal parts or shares, that is to say, one equal third part or share to his son *Joseph Gosling*, one equal third part or share thereof to his son *Thomas Morton Gosling*, one other equal third part or share thereof to his daughter *Hannah Fammond*, for her separate use, and from and after the decease of his said daughter, leaving lawful issue her surviving under the age of twenty-one years, upon trust to accumulate for their benefit as therein mentioned. He continued thus:—

“Provided always and in case any of my said children or grand-children shall happen to die without leaving lawful issue, then I direct, that the share of him, her or them so dying, of and in the interest, rents and annual income arising from the sale of my said real, leasehold, copyhold and personal estate and effects, or otherwise, shall go to the survivors of them, my said children and grandchildren (as the case may be), their, his or her heirs, executors or administrators, absolutely and for ever.

In a gift to *A.* (without any limitation of interest), “and if he should happen to die leaving lawful issue,” then to such issue, the contingency has reference to the death of *A.* and not to that of the testator. *A.*, therefore, does not take an absolute interest.

“Provided also, that if any of my said children or grand-children *shall happen to die leaving lawful issue* of him, her or them, then the share or shares of him, her or them, so dying, of and in the said rents, interest and monies arising from my said real and personal estate shall go to and be equally divided amongst such issue, as they severally and respectively attain to the age

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*v.*  
*TOWNSEND.* age of twenty-one years, who are to take *per stirpes*, and equally amongst them, if more than one; but if only one, then such one to take the share his, her or their parents would have taken, if living."

The testator died in *May*, 1841, and a question arose, upon the construction of his will, whether the gift to the two sons was an absolute gift, or amounted only to an estate for life, with remainder over, by way of substitution to their children respectively.

Mr. *Roupell* and Mr. *Shebbeare*, for the Plaintiff. The testator has directed the two-thirds of the property to be paid over to his sons without any limit as to interest. This alone would be an absolute gift. But he subsequently gives their shares over, on the contingency of their happening to die leaving no issue. This contingency must refer to the deaths of the sons, under such circumstances, in the testator's life-time, in which case alone the children are substituted. The sons, having survived the testator, are therefore absolutely entitled. They cited *Clayton v. Lowe* (a); *Gee v. Corporation of Manchester* (b); *Bindon v. Earl of Suffolk* (c).

Mr. *R. Palmer* and Mr. *Giffard*, *contrà*, referred to *Edwards v. Edwards* (d) as directly in point.

*The MASTER of the ROLLS.*

I think I cannot hold that this is an absolute gift to the sons, without overruling my own decision in *Edwards v. Edwards*. It appears to me it is the very case which I distinguished there and made an exception.

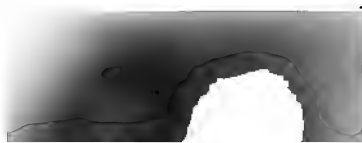
Where

(a) 5 *Barn. & Ald.* 636.

(b) *Q. B.*, January 13, 1852.

(c) 1 *P. Wms.* 96.

(d) 15 *Beav.* 357.



Where a period of distribution is fixed, and the testator speaks of a death previous to that time, the death, thus spoken of as a contingency, must refer to that period of distribution. But if a testator gives a legacy to *A.*, but if *A.* die without leaving issue then to *B.*, to what period can that be referred, except to the whole period of *A.*'s life? It appears to me to be the very distinction that was drawn in the case of *Farthing v. Allen* (a), and which I drew in *Edwards v. Edwards* (b).

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The case of *Gee v. The Corporation of Manchester* is distinguishable from this in some respect, which is very peculiar. If I was right in the conclusion I came to in *Edwards v. Edwards* (b), which has not been appealed from, where I expressly stated, that where the gift is to *A.*, and if he shall die without leaving a child to *B.*, the legacy vests in *B.*, if at any time, whether before or after the death of the testator, *A.* should die without leaving a child, I cannot hold differently in this case, without reversing my own decision, for I find it totally impossible to distinguish the two cases.

I remember taking great pains in that case, and after looking through the authorities, I was satisfied with the result which I there stated. If I was wrong in that case, I must still adhere to and follow it, until I shall be corrected by a higher authority.

I am of opinion, that the sons did not take absolute interests, and that on their deaths their shares would go over either to their issue (if any), or to the other children (c).

(a) 2 *Madd.* 310; 2 *Jarman on Wills*, 688.  
 (b) 15 *Beav.* 363.

(c) Affirmed by the Lord Chancellor and Lords Justices, August 4th, 1853.

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1852.

June 1.

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June 22, 23.

## DOWLING v. HUDSON.

A testator ordered his debts to be paid by his executors, and after giving legacies, he gave the residue of his real and personal estate, subject as aforesaid, to A., and he appointed A. and B. executors. Held, that if the legacies were charged on the real estate, the debts must also be charged thereon, and that therefore A. was able to give valid receipts for the purchase-money of the real estate, which relieved a purchaser from the necessity of seeing to its application.

THE testator expressed himself as follows:—"First, I order and direct, that all my just *debts* and funeral expenses *shall be paid by my executors*, as soon after my decease as may be convenient."

He then directed an annual mass for the repose of his soul, the expenses to "*be defrayed out of the residue of his estates;*" and he gave his wife and sister annuities, "to be charged and chargeable on his property at *High Park*." He next bequeathed to his daughter, *Anne Hudson*, "the sum of 2,000*l.* sterling," to be paid on her day of marriage. He gave his son *Hugh* certain leasehold houses, provided he attained twenty-one, subject to the head rents and other charges.

He proceeded, "And as to all the rest, residue and remainder of my property, real, freehold and personal, in *Great Britain* and *Ireland*, or elsewhere, I give, devise and bequeath the same, *subject as aforesaid*," to my son *Patrick Hudson*. He appointed his son *Patrick Hudson* and *J. C. M'Cann* his executors.

The testator died in 1840.

*Patrick Hudson* received personal estate to the amount of about 3,600*l.*, which he misapplied. He sold a freehold house of the testator, situate at *Bath*, to the Defendant *Henry Bell*, who had notice of the will. The house was conveyed in *June*, 1850.

*Patrick*

*Patrick Hudson*, after having misapplied the estate, absconded, without paying the legacy of 2,000*l.*, bequeathed to the testator's daughter *Anne*, who, by this bill, sought to charge it upon the *Bath* house, purchased by *Mr. Bell* (a).

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The bill had been taken *pro confesso* against *Patrick Hudson*, and the contest now remained between the Plaintiff and *Mr. Bell*.

*Mr. R. Palmer* and *Mr. Dean*, for the Plaintiff. First, the legacies are charged upon the real estate, for it is devised to *Hudson*, "subject as aforesaid," i. e. subject to the prior legacies. The blending of the real and personal estate, in the residuary gift, is also sufficient to charge the legacies on the real estate; *Hassel v. Hassel* (b); *Bench v. Biles* (c); *Cole v. Turner* (d); *Mirehouse v. Scaife* (e). The purchaser was therefore bound to see to the payment of the legacies. Secondly, the debts are not charged on the real estate, for they are to be paid by the testator's "executors," i. e. out of any estate vested in them, and unless land be devised to the executors, it will be presumed that payment is to be made exclusively out of those funds, which, by law, devolve on the executors, in their representative character; 2 *Jarman on Wills* (f); consequently the estate, which is devised to one only of the two executors, and in his character of relation, and not of executor, is not charged with the debts; *Warren v. Davies* (g). The vendor, therefore, had no power to give a valid discharge for the purchase-money, and the Plaintiff's legacy still remains a charge on the estate.

Mr.

(a) See 14 *Beav.* 423.(b) 2 *Dick.* 527.(c) 4 *Mad.* 187.(d) 4 *Russ.* 376.(e) 2 *Myl. & Cr.* 708.

(f) Page 523.

(g) 2 *Myl. & K.* 49.

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Mr. *Lloyd* and Mr. *C. C. Barber*, *contrà*, for the Defendant *Bell*. First, there is no charge of the legacies on the real estate. The words "subject as aforesaid" are satisfied by the charge of the annual mass, "out of the residue of his *estates*," and of the head rent, &c. on the leasehold. Secondly, if the legacies are charged thereon, so also are the debts, and this would confer on *Patrick Hudson* full power to give valid receipts for the purchase-money, and would relieve the purchaser from the obligation to see to its due application; *Ball v. Harris* (a); *Sugden's Concise View*, &c. (b). The same result follows from the circumstance of the legatee being an infant, incapable of concurring when the time of sale arrived; *Sowarsby v. Lacy* (c), and *Sugden's Concise View*, &c. (d). Thirdly, at all events, the personal estate was, in the first instance, applicable to the payment of the legacies, and the real estate was only charged in aid of it in case of a deficiency; but being sufficient, the charge on the real estate never arose, for it was not made liable for the trustee's defaults; *Sugden's Concise View* (e).

Mr. *R. Palmer*, in reply.

*The MASTER of the ROLLS.*

It is impossible to hold that the legacies are charged on the real estate without holding that the debts are also charged.

If the testator had said, "I order and direct my legacies to be paid by my executors," and without giving any real estate to them, these words would not  
 create

(a) 4 *Myl. & Cr.* 264.  
 (b) Sect. 5, p. 518.  
 (c) 4 *Mud.* 142.

(d) Sect. 6, p. 519.  
 (e) Page 518, n. (1), citing  
 1 *Salk.* 153.

create a charge of debts on the real estate; but if the will went on, without any intermediate gift, to say, "and subject as aforesaid, I give all the rest, residue and remainder of my real estate to A.," I should collect, without doubt, that the words "subject as aforesaid" would subject the real estate to the direction to pay the debts, for there is nothing else to which it would be applicable, and, unless applied to that prior charge, the words would be unmeaning. If, in addition, he had directed his legacies to be paid, I should also be of opinion that the charge would apply both to debts and legacies. On what just ground could the Court come to a conclusion that it included the legacies, but excluded the debts? If one only had been mentioned, that alone would be charged; and both being previously mentioned, both are charged.

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The Court has leant to holding debts, more especially, to be a charge on real estate, for, as Lord *Kenyon* observed, the inclination of the Court is to find a desire, on the part of testators, to be honest in the wills they make.

I do not refer to the fact that the mass is charged on the "residue of his estates." It is only material to this extent:—That if the charge is to be restricted to this, it would exclude both the legacies and debts; and that if not, it would extend to both.

I am of opinion that the purchaser was not bound to see to the application of the purchase-money, and that he is not liable to make good these charges.

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## WEALE v. OLLIVE.

June 23.

This Court will not assist a volunteer by making effectual an incomplete gift.

*A. B.* directed the certificates of some United States Bank shares standing in his name to be delivered to his nephew, and in a letter to him stated, that "he made a free gift of them" to him. *A. B.* also executed a power for transferring the shares, but which was not acted on in *A. B.*'s life.

The shares, being found in *A. B.*'s name at his death, were held to form part of his personal estate.

THE testator possessed a number of *United States* bank shares, which were transferable by appearing or by attorney at the bank. Being at *Lyons*, he, in *July*, 1845, wrote to the Defendant *Ollive*, his nephew, and speaking of the certificates (some of which the Defendant had received from the testator's agents, and the others in a tin box at the Bank of *England*, and for the latter of which, the testator sent his nephew an order to receive), he said:—"The whole of the contents of the said box, *I make a free gift to you*, from pure affection, and require no remuneration of any kind in return for it." The testator also wrote to Messrs. *Barings*, to transfer the shares to the Defendant, "as it was his, the testator's, wish to make him a *free gift* of the whole amount, for his own use, and renounce any claim of expectancy from him for the same, from this day, *July* 16th, 1845."

Shortly afterwards, a power of attorney for transferring the shares into the Defendant's name was forwarded from *England* to the testator, for his execution, which he accordingly executed and returned. The shares being very depreciated, the Defendant, with the knowledge and approval of the testator, did not transfer the shares before the testator's death.

The testator died in *January*, 1847, and the Defendant, *Ollive*, now claimed the shares.

Mr.

**Mr. R. Palmer** and **Mr. Cankrien**, for the Plaintiffs, argued, that as the shares still remained in the testator's name, they now formed part of his personal estate.

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**Mr. Teed** and **Mr. Schomberg**, for the Defendant, argued, that there had been a valid and effectual gift of the shares made to *Ollive*, or a sufficient declaration of trust in his favour. They cited *Ex parte Pye* (a), where a testator directed an agent in France to purchase an annuity for his natural daughter, and the annuity was purchased in the name of the testator, who sent a power of attorney authorizing its transfer, which was not acted on until after his death. Lord *Eldon* said, that the testator had committed to writing what seemed to him a sufficient declaration, that he held this part of the estate in trust for the annuitant (b).

**Mr. Roupell** and **Mr. Knight**, for other Defendants.

**The MASTER of the ROLLS.**

I think the case of *Ex parte Pye* does not constitute this a declaration of trust. It is clear that the testator did not intend to execute any declaration of trust, but to give the shares to his nephew. He wrote letters and did everything he could in that way, but the gift was never completed. In *Ex parte Pye*, the testator directed an annuity to be purchased for the benefit of a lady, but she being married and a lunatic, the agent purchased it in the name of the testator, and not of the lady; and the testator afterwards executed a power of attorney, authorizing its transfer to her. Lord *Eldon* thought, that an annuity having been created expressly for

(a) 18 Ves. 140.

(b) 18 Ves. 150.

# CASES IN CHANCERY.

3. for this lady, the testator had, by writing, constituted a trust fund for her benefit.

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ALE  
.  
LIVE.

In this case, if the testator had said, that, until the transfer, he would hold the shares, for his nephew's benefit, and pay him the dividends, that would have been a sufficient declaration of trust. Here, the intention was not completed ; nothing was done to make the gift effectual, and the case must be governed by the ordinary rule, which is, that the Court will not assist a volunteer by making effectual an incomplete gift.

## MATHEWS v. GARDINER.

June 22, 23.

A devise to A. and his "lawful heirs" creates a fee and not an estate tail. The addition "lawful" in no degree affects the word "heirs," for the qualification of being "lawful" is implied in the word "heirs."

Devise to testator's daughter "and her lawful heirs," "but in case she should not happen to leave any child," then to his nephew and his heirs.

Held, that the daughter took a fee simple, with an executory devise over to the nephew.

**T**HOMAS HUGHES, by his will dated in 1840, devised and bequeathed to two trustees and their heirs, all his real estate and money, upon certain trusts, for the benefit of his wife and daughter, during his wife's widowhood. He then proceeded:—"And from and immediately after the death or second marriage of my said wife, upon trust to assign, transfer, and make over, the whole of my said real estate and monies unto my said daughter *Sarah*, to hold to her and her lawful heirs; but in case she shall not happen to leave any child, then upon trust to assign, transfer, and make over my farm, called the *Warren Lodge Farm*, unto *Thomas Hughes* (his nephew), his heirs and assigns for ever."

In a subsequent part of his will, the testator directed, that

that in case his said daughter should "happen to die without leaving any child, his trustees should take his other property," except *Warren Lodge Farm*, as tenants in common; and he then gave certain pecuniary legacies.

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The daughter married the Plaintiff, Mr. *Mathews*, and an indenture was executed and acknowledged, which purported to bar the supposed entail of the real estate and to resettle the same. The question was, whether, under the devise, the daughter took an estate tail, or an estate in fee with an executory devise over.

Mr. *Roupell* and Mr. *Bevir*, for the Plaintiff. The words of the devise, to the testator's daughter and her "lawful heirs," creates an estate tail, for "lawful heirs" mean lineal heirs or heirs of the body of the daughter herself. The expression "lawful heirs" is equivalent to "heirs lawfully begotten," which have been held to create an estate tail; *Nanfan v. Legh* (a). Wherever the words used by a testator show, that by the "heirs" of a devisee lineal heirs are meant, they are held to create an estate tail.

The limitation over on failure of "lawful heirs" to the nephew, who was the collateral heir, also shows, that by this expression, heirs general were not included, and, consequently, the heirs are limited to those of the body of the daughter, and an estate tail is created, as in *Dutton v. Engram* (b). The word "child," moreover, in the gift over, shows that the testator meant, by the previous words, "lawful heirs," heirs of the body of his daughter. The word "heirs" may be qualified by the word "child;" *Jarman on Wills* (c); *Doe d. Jearrad v. Bannister*

(a) 7 Taunt. 85. (b) Cro. Jac. 427. (c) Vol. 2, page 325.

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*Bannister (a)*. Again, where the testator intended to create a fee, he did it by apt words, as in the gift to the trustees and their heirs.

Mr. *Rasch*, for Mrs. *Mathews*. There is an intention apparent in this will that the estate should not go over until a general failure of issue of the daughter. For if the daughter should have a child who died in her life leaving children, could the testator have intended the estate to go over to the nephew, while there were issue of himself and his daughter in existence? Wherever you find an intention that the limitation over should take effect only upon a general failure of issue of the first devisee, then that first devisee will take an estate tail. The intention of the testator is evident, from the use of the word "child," in the gift over, which is *nomen collectivum*, and is equivalent to "issue." He merely shows that he meant by "lawful heirs," heirs of the body of his daughter, and not heirs in the wider meaning of the term; consequently, the daughter takes an estate tail; *Tenny v. Agar (b)*; *Doe d. Jones v. Davies (c)*; *Raggett v. Beaty (d)*. He also referred to 1 Vict. c. 26, s. 29.

Mr. *Lloyd*, Mr. *Brandram*, Mr. *R. Palmer*, and Mr. *Elderton*, *contra*, were not heard.

*The MASTER of the ROLLS.*

My present impression is, that this is a fee, with an executory devise over; but out of respect to the arguments, I will look into the authorities bearing upon the case.

*The*

(a) 7 *Mee. & W.* 297.  
 (b) 12 *East*, 253.  
 (c) 4 *Barn. & Ad.* 43.

(d) 2 *Moo. & P.* 512; 5  
*Bing.* 243.

*The MASTER of the ROLLS.*

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I have fully considered this case, and I am confirmed in the view which I took of it at the hearing. I am satisfied, that this is a devise in fee simple, with an executory devise over. The words are:—"Upon trust to assign, transfer, and make over, the whole of my said real estate and monies unto my said daughter Sarah, to hold to her and her lawful heirs; but in case she shall not happen to leave any child, then" there is a gift over. Now, with respect to the first part of the clause, the word "heirs" is, in no degree, qualified or affected by the word "lawful" which precedes it, just as it makes no difference if you prefix the word "legitimate" to children, or "credible" to witness. It is no more than is implied in the simple word "heirs." It is very different from a devise to A. and his "heirs lawfully begotten," for there the Court infers, that the estate is to go to A. and to the heirs lawfully begotten of A., which words of limitation would clearly confer an estate tail.

The only mode by which I can construe this to be an estate tail is, by holding that the words "shall not happen to leave any child," imply an indefinite failure of issue. Now, I entertain no doubt, that if an estate be given in fee or for life, and it is afterwards given over after an indefinite failure of issue, the first estate is construed to be an estate tail for the purpose of giving effect to the testator's general intention. The question is; whether I can hold the words, "but in case she shall not happen to leave any child" to mean an indefinite failure of issue. I find no case to lead me to any such conclusion.

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There are some cases in which the Court has held "children" to be synonymous with "issue;" but if I were to hold that the words "in case she shall not happen to leave any child" meant an indefinite failure of issue, I should be unsettling a very large class of cases. In the case of *Doe d. Smith v. Webber (a)*, there was a gift to a niece in fee, and if she should happen to die leaving no child or children, then over to another person, paying 1,000*l.* to her executors, or to such persons as she should, by her will, appoint. The Court of Queen's Bench, in that case, held "issue" and "children" to be synonymous, and yet held, that this was a devise of a fee simple, with an executory devise over; and that by reason of the payment which was directed, it was intended to take effect upon the death of the first heir. In another case of *Doe d. King v. Frost (b)*, where a testator devised to his son in fee, and if he should have no children or child or issue, the estate, upon the decease of the son, was to become the property of the testator's heir at law, and to be subject to such legacies as the son might leave to the younger branches of the family: it was held, that the son took the fee, with an executory devise over, because it was contemplated, that this was to take effect immediately upon the death of the son.

I think that the words, "in case she shall not happen to leave any child" mean "in case she shall not happen to leave any child at her death." I think this is the rational and plain meaning of these words; and if so, the gift cannot, in my opinion, consistently with a large class of cases, which I do not now think it necessary to go into, be construed as anything but a fee simple,  
 with

(a) 1 *Barn. & Ald.* 713; 2 *Jarman on Wills*, 437.

(b) 3 *Barn. & Ald.* 546; 2 *Jarman on Wills*, 439.

with an executory devise over. I must therefore hold, that the suffering of the recovery has not given the wife a right to the estate.

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HOLGATE v. HAWORTH.

June 22.

**THE** intestate died in *May*, 1849, leaving four next of kin. The Defendant immediately took out administration, and within six months received 6,859*l*. Having made some payments, he retained the balance in his hands, which was ascertained in this suit to amount to 3,700*l*. A suit for administration had been instituted by another party, in the Duchy Court of *Lancaster*, on the 7th of *November*, 1850, to which the Plaintiff, who was entitled to one-fourth of the residue, was made a Defendant, but did not come in. The administrator paid the other three next of kin their shares, and obtained a release.

An administrator unnecessarily retained a balance of 3,700*l*. in his hands for three years. He was charged with interest, but was allowed his costs of an administration suit. Held, also, that the pendency of a suit for administration, in the Duchy Court of *Lancaster*, during the time, was no justification for the non-investment.

This cause now came on for further directions.

**Mr. Elmsley** and **Mr. Pemberton**, for the Plaintiff, asked that the Defendant might pay the costs of suit, and be charged with interest on his balances. They also argued, that, at all events, the Plaintiff's share, which alone remained unpaid, ought not to bear the whole costs of the suit for administration.

An administrator settled with three out of four next of kin, and the fourth having instituted a suit for administration, held that his share was only liable to one-fourth of the costs.

**Mr. W. M. James** and **Mr. Hare**, for the administrator, argued, that the pendency of the suit in the Duchy Court was a sufficient excuse for the non-investment, as the parties, if they wished the investment, ought to have taken proper steps for that purpose, by moving to have the assets brought into Court, or for a receiver.

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Mr. *Bagshawe*, for another party.

*The MASTER of the ROLLS.*

I am of opinion that the Defendant, the administrator, is entitled to his costs of this suit, which he must deduct out of the estate generally, and that the Plaintiff is afterwards entitled to one-fourth of the residue of the estate.

I am also of opinion, that the pendency of the suit in the Duchy Court of *Lancaster*, in which the Plaintiff did not come in and could not be compelled to come in, is not a sufficient justification for the Defendant's retaining the balance due to the Plaintiff in his hands for three years. The Defendant is liable to pay the Plaintiff's share, and interest from one year after the intestate's death; and the Defendant can impose on the Plaintiff's share only one-fourth of the cost of this administration suit.

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ROBINSON v. WEBB.

June 27.

A testator  
"devised and  
bequeathed his  
lands and prop-  
erty whatso-  
ever in *Aus-  
tralia*," to-  
gether with  
the arrears of  
rents, to *A.*  
and *B.* "their  
heirs and as-  
signs," and he  
gave the re-  
sidue of his estate and effects to *C.* Held, that his personalty in *Australia* passed under the first gift.

THE testator expressed himself as follows:—"I give, devise, and bequeath my lands and property, whatsoever, in *South Australia*, together with the rents and arrears of rents due to me at the time of my decease, in respect of the same," unto my friends Sir *Henry Webb*, Bart., and *Edward Wm. Jerningham*, Esquire, their heirs and assigns, as tenants in common; but

but **in** case either of them shall die in my lifetime, then I **give**, devise, and bequeath the same lands and property, and such rents, to the survivor of them, his heirs and assigns."

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**In** a subsequent part of his will, the testator added:—"And as to all the rest and residue of my estate and effects, whatsoever and wheresoever, I give and bequeath the same as follows:—As to one-third, to *V. O'C. Blake*," &c. &c.

**The** testator died in 1851.

**The** question was, whether the personal property in *Australia* passed under the first bequest.

**The** words "bequeath" and "property" were relied on as passing the personal estate in *Australia*, and on the other hand, the expressions "rents," &c. in "respect of the same," and the limitation to "heirs and assigns," were insisted on, as showing that the testator contemplated real estate only, to which these words were peculiarly applicable.

**Mr. R. Palmer** and **Mr. Baggallay**, for the Plaintiffs, the executors.

**Mr. Campbell** and **Mr. Riddell**, for the Defendant *Blake*.

**Mr. John Baily** and **Mr. Selwyn**, for other parties.

**The MASTER of the ROLLS** was of opinion that the first words were sufficient to pass the personal estate in *Australia*, and that they were not cut down or restricted by the subsequent expressions. He observed, that it had been

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been said, that the words "heirs and assigns" were not properly applicable to personalty, but the same observation would apply to the arrears of rent.

In conclusion, he said, that he had no doubt that this was a specific bequest of the property in question.

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COOKSON v. BINGHAM.

June 28, 29.

Devise of "my landed estate in *Westmoreland*," with their appurtenances, and all allotments of common now inclosed, to the testator's three daughters, "to be jointly and equally enjoyed or divided in case of marriage of any of them, and they or the survivor, in case of death, are hereby fully authorized to dispose of the same by will or assign-ment."

Held, that the first words gave the fee, and the second created a joint tenancy, and that the survivor alone had power to devise.

The testator gave his "personal estate, in money and funds," to his three daughters equally; also all plate and furniture, to be shared like the personal estate; also to his three daughters all his books, pictures, &c.; also a leasehold house, particularly named. Held, that as to the books and leasehold, the daughters were

THE will of *John Bownas*, dated in 1821, contained this clause:—"My landed estates in the county of *Westmoreland*, of whatever description, with their appurtenances, and all allotments of common, now enclosed or hereafter to be granted and enclosed, to my dear daughters, *Jane*, *Mary Ann* and *Sarah*, to be jointly and equally enjoyed, or divided in the case of the marriage of any of them; and they or the survivor, in case of death, are, by this my will, fully authorized to dispose of the same, by will or assignment, as they shall think proper, giving preference to those of my name and relations, according to behaviour."

"I also give and bequeath to my three daughters above mentioned, all my personal estate, in money, funds,

case, the costs follow the same rule as in administration suits, and are general residue; and if there be none, out of the property specifically

**funds**, debts, or otherwise, to be by them *equally divided* and shared among them, first subject to the *legacies* and expenses mentioned in this my last will; **also**, all plate, jewels and furniture, in all my houses at the time of my decease, to be shared like the personal **estate**. Also, to my said three daughters, all my books, **pictures** and prints, music and musical instruments; **also** the houses in *Allsopp's Buildings*, the lease of **which** I lately purchased." The testator added, that all his **daughters** being of mature age to act, he scarcely **needed** to recommend them to remain together as long as **they** could.

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**The** testator died in 1823.

**The** three daughters all died without having been **married**—*Sarah* in 1828, *Mary Ann* in 1851, and *Jane* in 1852; and no act has been done by either of them to **sever** the joint tenancy, if any. They all made wills.

**The** Plaintiffs claimed a portion of the freehold, copyhold and leasehold estates of the testator under the will of *Mary Ann*. The Defendant, on the other hand, **claimed** the whole, on the ground that the three sisters **were** joint tenants; and there having been no severance of **the** joint tenancy, that *Sarah* and *Mary Ann* had no **testamentary** power of disposition over the property **held** by them in joint tenancy.

**Mr. R. Palmer**, **Mr. Rudall** and **Mr. Hetherington**, for the three Plaintiffs. First, the three sisters took the real estate under their father's will, as tenants in common in fee. The only difficulty in the way of this construction is, the word "jointly." But this, being inconsistent with the rest of the clause, must be rejected; *Lewen v.*

*Cox*;

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*Cox* (a); *Ettriche v. Ettriche* (b); *Perkins v. Baynton* (c); *Blisset v. Cranwell* (d). The superadded power of appointment is, in that view of the case, merely surplusage, and proceeded from the over anxiety of the testator to give his daughters complete dominion over the property, or a disposing power after marriage. Secondly, but if this be not the true construction, then the terms of the will give the daughters an estate for life only, with a joint power by deed, and a several power by will, to appoint their respective shares. Thirdly, they, at all events, took the leasehold as tenants in common, in the same way as they did the other personal estate, which was to be "equally divided" amongst them. The gift of the leaseholds being connected with the former bequest, by the word "also," the leaseholds must be taken by the daughters, in the same manner as the other personalty, that is, as tenants in common.

The Solicitor-General (Sir *R. Bethell*), Mr. *Grove*, Mr. *Roupell* and Mr. *Bird*, for the Defendant, were not called on to argue the question as to the real estate. As to the personalty, they contended that the testator had divided it into three kinds, constituting, in each case, distinct specific bequests. The first being "money, funds, debts or otherwise;" the second, his plate, jewels and furniture; and the third, the leasehold and books, &c. The first were to be "equally divided," and the second "to be shared like the personal estate," and they both therefore passed to the daughters as tenants in common. But as in the specific bequest of the leasehold there were no words importing division, they passed to them in joint tenancy. As to the costs, they could not be thrown on the specific bequest, but must be charged

(a) *Cro. Eliz.* 695.

(b) *Ambl.* 656.

(c) 1 *Bro. C. C.* 118.

(d) 1 *Salk.* 226.

charged on the residuary estate, and if there were none,  
no costs ought to be given.

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*The MASTER of the ROLLS.*

I am of opinion, as regards the real estate, that this is a joint tenancy in the three daughters. Mr. *Rudall* argued, that the word "jointly" ought to be rejected as inconsistent with the rest of the will. I do not doubt that there are many cases in which the word "jointly," and also the word "survivor," have been restricted in their meaning by the accompanying words, and what, at first sight, has appeared to be a joint tenancy, has been held to be cut down into a tenancy in common; but in all cases of wills of this description, the Court must look at all the testator's words, and collect his meaning from the whole will. Now, when this testator intended to create a tenancy in common, he has clearly expressed his intention, for, in one instance, he says, "to be by them equally divided and shared among them;" whereas in the first part of the clause he says, "to be jointly and equally enjoyed" which is quite distinct.

The construction put upon this will by Mr. *Palmer* and Mr. *Hetherington* is very plausible, and more difficult to deal with, namely, that it is a joint tenancy for life, with a power of disposition by will. But I am of opinion that this is not the true construction of this devise. He gives the real estate to his daughters jointly, in words sufficient to pass a fee simple; and as I cannot strike out the word "jointly," so neither can I stop at the word "divided," but I must read the whole devise to be to them, to be jointly enjoyed, or divided in case of the marriage of any of them. If I stop there, it is a joint inheritance in fee. So far then, they took as joint

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joint tenants in fee, but the question is, whether the subsequent words cut down the joint inheritance thus given. Mr. *Rudall* says, that all the subsequent words are applicable only to the case of the marriage of any of them, and if so, they would not cut down the previous joint gift in fee, for the only object would then be, to protect the daughters who married against their husbands, and to give them power of disposition, notwithstanding coverture; those powers, therefore, would only arise in case of their marriage, which never took place. I think that the power of disposing of the property by will can only be intended to apply to the survivor, and that the clause is to be read as saying, these persons are authorized to dispose of by assignment, or "the survivor," in case of death, should there be only one, is authorized to dispose of "the same" by will, that is, of the entirety of the landed estates, and not each her own share. The joint tenancy is not therefore cut down.

In the latter part of the will, the testator recommends his daughters to live together, as long as they could; he seems, therefore, to have contemplated the probability of their all living together, and so enjoying the property "jointly and equally." Though the will is obscure, I think the real estate was devised to the three daughters as joint tenants in fee.

As to the leasehold, the bequest is specific, and not included in or connected with the preceding bequest of the personalty; and as there are no words indicating a tenancy in common, the three daughters took the leaseholds as joint tenants.

With regard to costs, the general rule is, that they are payable out of the general residue; but if the whole property is specifically given and there is no residue,  
 the

the specific legacies must bear the costs. This is the general rule in administration suits; and though this is a special case, for the opinion of the Court as to the construction of the testator's will, I must follow the same rule. The questions in this case have been occasioned by the obscure and ambiguous language of the testator, and it was quite proper to take the opinion of the Court as to the rights of the parties. The costs must therefore be paid as I have already stated (a).

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(a) Affirmed by the Lord Chancellor, upon appeal, on the first point, 16th November, 1853.

SHERWIN v. SHAKSPEARE.

**T**HIS was a bill for specific performance of a contract, entered into in 1843, for the purchase of an estate called *Langley Priory*. The only questions between the parties were, first, from what time the purchase was to pay interest on his purchase-money; and, secondly, who was to bear the costs of the suit.

In 1843, the Plaintiffs put up the property for sale by a auction, but no sale having then been effected, they,

the purchaser shall pay interest on the purchase-money, from that day till the completion of the purchase, is inoperative, where a good title has not been shown by the vendor within the time stipulated; but it is operative where it is the result of accident, or of something which could not have been guarded against by the vendor. A vendor in possession must account for the rents and profits as in the case of a mortgagee in possession.

In a suit by vendor for specific performance, costs were given to him, although both parties were in the wrong as to the only point in contest, namely, as to interest on the purchase-money, a good title having been shewn prior to the institution of the suit, and it appearing that the conduct of the purchaser had prevented the completion down to that time.

Distinction between showing a good title on the abstract and verifying it.

June 28, 29.

Principle of the decision in *De Visme v. De Visme* (1 *Hall & Tw.* 408; 1 *Macn. & G.* 336) explained.

A condition, that "if, from any cause whatever, the purchase shall not be completed on a day named,

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on the 30th of *November*, 1843, entered into an agreement with the Defendant, *John Shakspeare*, for the sale of the estate for 76,500*l.*, exclusive of timber, but subject to the printed particulars and conditions of sale, so far as the same were applicable to a sale by private contract.

The fifth condition of sale was in these words, “if, *from any cause whatever*, the purchase shall not be completed on the 25th of *April* next, the purchaser shall pay interest after the rate of 4*l.* per centum per annum on his purchase-money,” &c. “from that day until the completion of the purchase.” The seventh condition stated, that “the vendors will, at their own expense, deduce a good title to the premises sold, according to these conditions, and deliver an abstract of title within two months, to the purchaser or his solicitor, on application being made by them, and within six weeks from the delivery of the abstract, all objections to the title shall be stated in writing, and delivered at the office of the vendor’s solicitors; in default of which, the title shall be considered as accepted.” The tenth condition provided as follows:—that “the purchaser shall tender or leave his conveyance for execution by the vendors ten days before the 25th day of *April* next, at the office of Mr. *Barber*” (the Plaintiffs’ solicitor). The eleventh condition enabled the purchaser to refuse a small part of the estate, and to have a corresponding abatement in the purchase-money, but not to be at liberty, on that account, to refuse to complete altogether.

The deposit on the purchase-money not having been paid by the purchaser, as agreed, the Plaintiffs brought an action against him to recover damages for the breach of agreement; and on the 30th of *January*, 1844, a fresh agreement was entered into between the Plaintiffs  
 and

and Defendant, that the agreement of the 30th of *November*, 1843, should, subject to certain alterations not material to be noticed, be carried out, and that the agreement then made should, so far as the time then elapsed would permit, be performed as if it had been made on the 30th of *November*, 1843, and that such objections and requisitions only as to the title and evidence of title should be made, as a willing purchaser would be advised to make for his necessary protection.

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The title-deeds and abstracts of title were partly in the hands of Mr. *Mousley*, as solicitor of certain mortgagees of the greater portion of the estate, and partly in the possession of other mortgagees or their solicitors, and partly in Mr. *Barber's* possession.

On the 1st of *March*, 1844, Mr. *Barber* delivered to Mr. *Mousley* the abstracts of title in his possession, reminding him, at the same time, of the abstracts in his own hands, and on the 19th of the same month, Mr. *Mousley* wrote to Mr. *Barber* to say, that the abstracts delivered by him were imperfect. On the 26th of *June*, 1844, Mr. *Mousley* sent thirty-nine requisitions on the title, to which answers were returned on the 17th of *September* following. Two only of these requisitions materially affected the question of title; one of them was removed on the 7th of *August*, and as to the second, an additional abstract of title was obtained in *November*, 1844, on which Counsel gave a further opinion, and on the 29th of the same month, Mr. *Mousley* wrote to Mr. *Barber* in these words:—"We shall assume you will furnish all that is required by Mr. *L.*'s opinion, and shall proceed as fast as we can to complete the purchase."

Besides this, on the 29th of *October*, 1844, Mr. *Mousley*

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*ley* delivered further objections to title, alleging that no title had been shown to twenty-five other messuages and pieces of ground, a very small part of the estate; and the Plaintiffs being unable to make out a good title to all or some of them, called upon the Defendant to elect, under the provisions of the agreement, to accept such title as they had to this part, or reject it altogether, and take an abatement in the purchase-money, and the Defendant ultimately accepted the title thereto.

On the 5th of *November*, 1845, the draft conveyance, &c. were sent by Mr. *Mousley* for Mr. *Barber's* perusal, subject to compliance with the requirements of Counsel as to the title, and subject to certain alterations of no great importance. They were approved by all parties, and returned to Mr. *Mousley* on the 26th of *February*, 1846; but through delays occasioned by Mr. *Mousley*, the purchaser did not finally approve of the draft till the 5th of *August*, 1847. Several attempts were made by Mr. *Barber* to settle the points in dispute, both as to the requisitions and conveyance, but without effect, and ultimately the whole matter was referred to Mr. *Lloyd* and Mr. *Smith*, who met, in *July*, 1847, and gave a joint opinion upon the questions in dispute, and made certain requisitions, all of which the Plaintiffs fully satisfied. In *December*, 1847, the conveyance, &c., were engrossed and executed by all parties whose execution Mr. *Barber* was to procure; nevertheless Mr. *Mousley* took new objections, on the score of valuations and interest on the purchase-money, and he refused, at the same time, to go into these until all other questions had been settled.

At last, in *July*, 1852, the Plaintiffs filed their bill to compel specific performance of the contract, and they now asked, that the Defendant might be charged with  
 interest

interest on the purchase money, from the time when, by the terms of the agreement, the purchase money was to be paid.

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*The Solicitor-General* (Sir R. Bethell), Mr. Lloyd, and Mr. Bird, for the Plaintiffs. This suit has been rendered necessary by the unjustifiable refusal of the Defendant to complete, although he had accepted the title; he ought therefore to pay the costs of suit, and as the delay is wholly attributable to him, he ought also to be compelled to pay interest on his purchase money. The purchaser, by not now asking for a reference as to title, admits that the requisitions as to title were fully complied with, and that a good title has been deduced.

The vendors delivered a complete abstract of title in November, 1844, for the requisitions afterwards delivered and fully answered formed no part of the abstract of title, but involved merely the evidence of it; and though they were not delivered and answered until after November, 1844, yet it must nevertheless be taken, that a complete abstract was then furnished. . All that the condition of sale required was the delivery of the abstract in two months; but all the rest, being matter of verification only, and not a material part of the abstract, might be delivered at any time, and need not be produced till required by the purchaser. Even the abstract of title itself, according to the conditions of sale, is only to be delivered to the purchaser on application made by him. Then, by the 5th condition of sale, it is stipulated, that if, *from any cause whatever*, the purchase is not completed on the day named, the purchaser shall pay interest on the purchase money. This being so, the Plaintiffs are entitled to the benefit expressly stipulated for by them, and to have interest on the purchase money, from

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from the day named; *Esdaile v. Stephenson* (a). It is true that in *De Visme v. De Visme* (b), the purchaser was relieved from the burthen imposed by such a condition; but that was because the vendor had failed to complete his part of the stipulation. In such a condition, there are two parts, one of them to be performed by the vendor and the other by the purchaser, and a breach by the former sets the latter at liberty; *Paton v. Rogers* (c); *Robertson v. Skelton* (d); *Rowley v. Adams* (e); *Wilkinson v. Hartley* (f). Here the case differs, for the vendor has delivered a complete abstract and deduced a good title, within the time limited, the subsequent requisitions being only evidence in support of it. They do not therefore fall within the principle of *De Visme v. De Visme* and the other cases.

Mr. R. Palmer, Mr. James, and Mr. Cairns, for the Defendant, contended, that the Plaintiffs were in default in not showing a good title within the time stipulated; that the entire contest had arisen out of the demand by the Plaintiffs of interest from *April*, 1844, and not merely from *July*, 1847. That a large portion of the bill related to the conduct of the parties before a good title had been shown, or before the case was referred to the arbitrators; and that the whole litigation was caused by the attempt of the Plaintiffs to fix the Defendant with interest anterior to 1847. That the Plaintiffs, therefore, ought to pay the costs and were entitled to interest only from the latter date.

*The MASTER of the ROLLS.*

I entertain no doubt that the Plaintiffs are entitled to the

(a) 1 *Sim. & Stu.* 122.

(b) 1 *Hall & Tw.* 408; 1 *Macn. & Gov.* 336.

(c) 6 *Madd.* 236.

(d) 12 *Beav.* 363.

(e) 12 *Beav.* 476.

(f) 15 *Beav.* 183.

the costs of this suit. My view of the case is this:—In the first place, with regard to the conditions of sale, I do not mean to lay it down as a rule to be always acted on, that, whenever there is a condition of sale, “that if, from any cause whatever, the completion of the purchase is delayed beyond a particular day, all interest shall be paid from that day,” the interest should only be paid from the time the title is made out. Though I do not mean to lay down any such general proposition, yet I think it must be so held in the present case, and that, for the reasons I am about to state. I concur in the general statement of the rule of the Court by the Solicitor-General, and which is laid down in *De Visme v. De Visme* (a), namely, that the vendor shall not take advantage of his own wrong, and, by reason of it, obtain an advantage which he would not otherwise be entitled to. But the difficulty which the Court feels, in cases of this description, is, that it is impossible, in most cases, to ascertain whether the default is wilful or not. I do not concur in the observations, strongly urged on behalf of the Defendant, that it is essential that fraud in the vendor should be proved, or that the default made by him be wilful. Fraud is, I think, quite out of the question. But if the delay were the result of gross negligence, or if the difficulty in the title was such, that the vendor, if he had been so minded, might have remedied it, he shall not, by reason of his negligence, obtain a larger amount of interest from the purchaser than he would otherwise have been entitled to. Various illustrations of this may easily be given. Thus, suppose the difficulty arose from the name of a person being incorrectly stated in a certificate of burial or of baptism; that might occasion delay. But how is the Court to ascertain that the vendor did not know

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(a) 1 Hall & Tw. 408; 1 Macn. & Gor. 336.

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know of that error at the time he furnished the certificate to the purchaser. If he did know it, he ought not to have the benefit of the increased amount of interest which would arise from the delay occasioned by the fresh requisitions of the purchaser, in consequence of that defect. So also, if there were a defect with respect to the identity of the parcels, or other like matters, it would be almost impossible for the Court to ascertain whether the vendor really knew of the defect at the time when the information was afforded. If then, it does clearly appear, from other sources of information, and is incontestably proved, that it was a mere case of accident or a thing that the vendor could not have guarded against, I should be of opinion, that the vendor would be entitled to the increased amount of interest which would arise from that circumstance. But where the delay in making out the title has been from the default of the vendor, I can only follow that which I conceive to be the proper rule, by holding, that the vendor not having performed that which he has undertaken to perform, by making out a good title within the specified time, the condition as to interest shall be dispensed with as regards the purchaser.

It was strongly urged in this case, that if the title was not made out, the default was owing to the purchaser's not having made certain requisitions, which, if he had made, the title would have been completed; but, I think it clear, that it is the duty of the vendor to make out the title before the purchaser makes any requisition to him for that purpose; for if it were otherwise, the vendor might wilfully abstain from completing the title till the purchaser requests it, for the purpose either of gaining a greater amount of interest, or of relieving himself from the trouble and expense of the investigation and making out of his title. In this case, therefore,

therefore, where the original conditions of sale, as varied on the 30th *January*, 1844, have not been complied with, on the part of the vendors, by deducing a good title at the time expressly agreed upon by the contract, it should follow, that down to the time when a good title was really made out, the purchaser is discharged from that condition of paying interest. The 17th condition of sale is distinct, "that they (the vendors) shall deduce a good title to the premises, and deliver an abstract of title within two months," that is, an abstract showing that title.

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I have, therefore, only to consider when the title was first made out. It is said that the abstract was delivered in *November*, 1844, and that no fresh abstract was required after that time, and it is contended, that the verification of the facts alleged in an abstract is a matter not of title, but of evidence. That proposition is true in a great many, but not in all cases, and it is necessary to distinguish between them. If a vendor delivers an abstract, deducing a title by certain deeds and documents specifying their titles, dates and contents; the verification of the abstract with those deeds and documents, is a mere question of evidence, and the title is made out by the abstract as delivered. But where there are facts alleged in the abstract, which require evidence, either oral or documentary, to prove them, which evidence is not produced, the production of the evidence necessary to prove such facts constitutes a question of title. Two familiar instances of this may be mentioned. Suppose a person of the name of *A. B.* is alleged to have been the owner at a particular time, and that it is necessary to prove the identity of this *A. B.* with another person of the name of *A. B.* In such a case, the fact of the identity, which is asserted but is not shown by the abstract, is not a question of evidence

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solely, but is a question of title also. Again, where a deed comprises certain parcels, which do not agree in their description with the parcels sold, the abstract may assert that the parcels in the deed and those sold are identical, but the verification of that identity is not a mere question of evidence, but is a question of title. Evidence to establish it must be furnished, and, until that evidence has been given, the Court holds that a good title has not been shown. In cases of that description, it is therefore impossible to say, that because an abstract has been delivered stating all the facts, but which are not verified until a later period, it necessarily follows, that a good title was shown at the time when the abstract was delivered. It is necessary to examine the nature of the facts alleged upon the abstract, and determine whether their truth would necessarily appear from a mere verification of documents stated, or whether it must be shown by the production of further evidence.

I have listened attentively to this case, in order to ascertain whether the requisitions made, which were singularly vague and obscure, were of the former or the latter character. But, I am of opinion, that I have no proof before me to show, that the title was made out previously to the meeting between Mr. *Lloyd* and Mr. *Smith* in *July*, 1847. It appears to me, that at that time, they finally determined every question both of title and conveyance.

Upon this extremely obscure case, I must hold, that a good title was shown on the 31st of *July*, 1847, and that from that time, at least, the purchaser must, according to the conditions of sale, pay interest at 4l. per cent. on the purchase-money, and that, on the other hand, the vendor must account for the rents and profits of such part of the property as he has been in possession of, down to the present time, and of the other parts thereof down to 1850, when the purchaser was put into possession.

sion. This account of rents must be taken in the same manner as in the case of a mortgagee in possession, namely, of that which, without the Defendant's wilful default, he might have received.

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With respect to the costs of the suit, it appears to me, after giving the most careful attention to the whole of the case, that I must look to the general conduct of the parties. I am of opinion that I cannot adopt the view of the Defendant, that this suit was simply occasioned by a question respecting interest, which having been determined to be less than the Plaintiff claimed, but more than the Defendant insists on, the costs of the suit ought to be divided. I think that it is impossible to look at the proceedings of Mr. *Mousley*, with respect to the whole of this matter, without seeing, that from some cause or other, there has been a fighting and fencing off the completion of this contract; and my conviction upon the evidence is, that unless this bill had been filed, the contract would not have been completed up to the present time; there is, therefore, very considerable excuse for the mode of framing this bill, from the necessity there was of showing the conduct of and dealings between the parties.

[*The MASTER of the ROLLS* here commented on the conduct of the parties, and the several proceedings, in detail.]

I think it useless to go further into the details of this case. The matter goes dragging its slow length along, until the month of *July*, 1852, when the bill was filed, and on the whole of the case, I entertain no doubt that the delay in completing has been occasioned by the conduct of the Defendant's adviser, and that even if the Plaintiff had filed his bill sooner, the Defendant's  
 conduct

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conduct would have made me think, that he ought to pay the costs of the suit. I have no doubt that he was personally ignorant of the whole matter, but this, unfortunately, is one of the calamities which arise in cases of this description, and which shows how necessary and important it is, that persons should be careful as to whom they intrust the conduct of their affairs, because the conduct of Mr. *Mousley*, who was the agent of the Defendant Mr. *Shakspeare*, binds him in all this matter.

As to the frame and scope of the bill, I shall give the direction, which I invariably give the Taxing Master, that if he shall find that the bill is too prolix, he may reduce and moderate the costs of it. I have repeatedly stated my reason for so doing. I think it, however, impossible to hold, that the Plaintiff could safely have filed a simple bill for specific performance, raising the question of interest and no other, for it might have been found, that a good title was not shown before the filing of the bill, and the Plaintiffs would then have had to pay the costs of suit. It would then have been supposed, that the question of interest was the only thing which prevented the completion of the contract, and that this was the only contest between the parties, whereas, in the view I take of this case, that was only one of a number of questions raised by the Defendant, one after another, to delay, for an indefinite period, the completion of the contract.

The result of my opinion, drawn from the general conduct and dealings between the parties, and from the whole of the correspondence and communications between them, is, that this suit was occasioned by the conduct of Mr. *Mousley*, and that unless that conduct had taken place, the contract would have been completed at a much earlier period; consequently, the costs of this suit must be borne by the Defendant.

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## BUSHBY v. ELLIS.

July 1.

**T**HE testator had two estates in *Jamaica*, called *Montpelier* and *Greencaste*. By his will, he charged all his real and personal estate with the payment of his debts, and he directed that four-sevenths of his debts should be paid out of his *Montpelier* estate, and three-sevenths out of his *Greencaste* estate. And he devised his *Montpelier* estate (subject to four-sevenths of his debts) to his son Lord *Seaford*, and his *Greencaste* estate (subject to the payment of three-sevenths of his debts) to his son *John Ellis*.

The testator died in 1782. He had granted two life annuities of 200*l.*, issuing out of the *Montpelier* estate, and after his death, the whole of these annuities were paid by Lord *Seaford* down to the deaths of the annuitants, in 1820 and 1829 respectively. *John Ellis* in no way contributed to these payments, though his three-sevenths amounted to a sum of 6,835*l.*

In 1823, *John Ellis* mortgaged his *Greencaste* estate to *Timperon* and *Dobinson*.

In 1830, Lord *Seaford*, as he alleged, first became aware of his rights against his brother's estate, under the will of his father. In 1831, he brought forward this claim in a suit against his brother *John Ellis*, and established his right by a decree in this Court, but the Plaintiffs, the mortgagees, were not parties to this proceeding, and therefore were not bound by it.

*A.* and *B.* had charges on a plantation and the slaves. In 1834, an issue was tendered in a suit between them as to their priority on the slave compensation money. *B.* withdrew his claim, and the bill was, on motion, dismissed. Sixteen years afterwards, when the witnesses were dead, *B.*'s executors raised the same question of priority, in regard to the plantation itself. Held, that they were concluded by the transactions of 1834.

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In 1834, the slave compensation money, in respect of the *Greencaste* estate, became payable. It was claimed by the mortgagees, but Lord *Seaford* made a counter claim for the three-sevenths of the annuities paid by him. A bill was thereupon filed by the mortgagees against Lord *Seaford*, who put in his answer, making the same claim, but he afterwards formally withdrew it, and on motion, the bill was, by consent, dismissed without costs; and the Plaintiffs, in 1837, received the whole compensation money.

Lord *Seaford* died in 1845, and by this bill, filed in 1848, the Plaintiff sought to realize their security and to obtain, as against the executors of Lord *Seaford*, a declaration of their priority over his claim, in respect of the payment for the two annuities.

Mr. *R. Palmer* and Mr. *Dickinson*, for the Plaintiffs, argued, that the Plaintiffs had priority over Lord *Seaford's* charge. They relied on the conduct of Lord *Seaford*, at the time the mortgagees advanced their money, on the great lapse of time, and the total abandonment by Lord *Seaford* of his claim, in 1837. They insisted that if a will when recorded was notice, then Lord *Seaford* could not set up his ignorance of his rights under the will of his father; besides which, that will was the foundation of his title, and as he had acted under it and had barred the entail thereby created, he could not plead ignorance of its contents.

Mr. *Roupell*, Mr. *Messiter* and Mr. *Mackeson*, for the executors of Lord *Seaford*, argued, that the charge on the estate was still subsisting, and that Lord *Seaford's* priority had not been disturbed. That nothing had occurred in 1823 to deprive him of his right, and that the statement (if any) then made was not binding, being  
made

made under a mistake, and in ignorance of his rights. That the transaction in 1837 could not be said to amount to a decree in favour of the mortgagees, and if not, it amounted to nothing; and as the will had been recorded in *Jamaica*, it was notice to all the world, and consequently the mortgagees took with notice of the charge.

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Mr. Rogers, for Chabannes.

Mr. Druce, for a mortgagee.

*Scott v. Nesbitt* (a); *Leith v. Irvine* (b); *Bunbury v. Winster* (c); 3 *Burge's Comm.* (d); 33 *Car.* 2, c. 22; 4 *Geo.* 2, c. 4; 14 *Geo.* 3, c. 5 (*Jamaica* statutes), were cited —

THE MASTER of the ROLLS.

I am of opinion that the Plaintiffs are entitled to a decree establishing their priority over the executors of Lord Seaford, and upon these grounds:—

Certain representations were made by Lord Seaford, at the time when the money was advanced by the Plaintiff, in the year 1823. It appears that some communications took place (the effect of which I shall presently consider) between the Plaintiff and Mr. Grant (as the solicitor both of the mortgagors and of Lord Seaford), and that Lord Seaford was present at that time. Upon the strength of what took place, they advanced a considerable sum of money. Lord Seaford was, at that time, entitled, under his father's will, to the *Montpelier* estate, charged with certain annuities, three-sevenths of which annuities

(a) 14 *Ves.* 438.

(b) 1 *Myl. & K.* 277.

(c) 1 *Jac. & W.* 255.

(d) *Page* 349.

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annuities were, under the same will, charged upon his brother's estate, upon which the consignees were about to advance a considerable sum of money. This will, it appears, was registered in the Island of *Jamaica*, and therefore gave constructive notice to everybody. In addition to this, the evidence convinces me, that everybody concerned had actual notice of that will, and it would be a very strong proposition to say, that a gentleman in possession of an estate was ignorant of the contents of the very will under which he held it. He might probably have forgotten it at the time, and I do not doubt that he spoke the truth, when he said, at that time, that he was wholly ignorant that he had any such claim against the estate, upon the security of which the proposed advance was intended to be made.

It is argued, that if any assertions were made at that time to the Plaintiffs, that the estate, upon which the advance was to be made, was unincumbered, they were not binding on Lord *Seaford*, because he was then really ignorant of the fact. Now I have held, in *Pulsford v. Richards* (a), *Money v. Jordan* (b), and in several other cases, that where a person makes a positive representation of a fact, and other persons act upon it, he must be bound to make that good. The same principle applies at law, as in *Pasley v. Freeman* (c), and that class of cases, which have also been followed in Courts of Equity.

I have not arrived at the conclusion that Lord *Seaford* or Mr. *Grant* (the agent of the mortgagor and the solicitor of Lord *Seaford*) did make these assertions, for although Mr. *Dobinson* swears that his firm agreed to  
advance

(a) *Ante*, p. 87. (b) 15 *Beav.* 372. (c) 3 *Term Rep.* 57.

advance the money, "upon the assurance that they were unincumbered," he does not state by whom the assurance was made, and undoubtedly the matter is left obscure; but the ground upon which I hold that the Plaintiffs are entitled to priority is founded upon the transactions which took place upon the claim to the compensation money in the year 1836. In that year, the compensation money for the slaves on this estate set apart for the persons entitled, was claimed by the mortgagees and also by Lord *Seaford*, who put in a counter claim, grounded on the very circumstances now insisted on. A bill was filed in this Court by the mortgagees, in which they positively alleged, "that during all these negotiations and at the several meetings so had as aforesaid, it was always represented by Mr. *Grant* (as the solicitor both of Lord *Seaford* and of the mortgagees), and also by Lord *Seaford* himself, personally, that the estates of the mortgagor were freed from all incumbrances." Lord *Seaford* put in an answer to that bill (upon honour), wherein he denied, according to the best of his recollection and belief, that any such statements had been made, and that if any such statements had been made by others, they were perfectly false. The result however was, that the very issue now tendered being then raised, he withdrew his claim, and, by consent, the bill was dismissed without costs, and in 1837, the mortgagees were allowed to receive the whole of the compensation money.

It is now sixteen years since the very point now raised was put in issue between these parties. There might, at that time, have been abundant evidence to prove how the fact was, and the reason evidence was not then entered into to prove it, arose from Lord *Seaford's* withdrawal of all claim to the money. It is impossible for me to place the parties in the same position now in which they

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they were at that time. Both Mr. *Grant* and Mr. *Timperon* are dead, and the means of bringing forward their evidence is therefore gone. It appears to me that Lord *Seaford*, at that time, from one cause or another, did not think it right to insist upon his claim, and that by reason of his withdrawal of it, the Plaintiffs, if they had the means of proving their case at that time, were prevented doing so. It is upon this ground that I proceed, for I by no means concur in the argument, that this proceeding must either be treated as equivalent to a decree in favour of the Plaintiffs, or as amounting to nothing. In my opinion, it amounts to a great deal, but to nothing like a decree in favour of the Plaintiffs.

By reason of the withdrawal of the claim of Lord *Seaford*, it became unnecessary and impossible for the mortgagees to establish their case against him and now, sixteen years after, the same claim is again raised by Lord *Seaford's* executors. Lord *Seaford* died in 1845, without ever having attempted to enforce his claim against the estate; and although he filed a bill and obtained a decree against his brother in 1831, yet he never, down to his death, established or sought to establish his claim against the mortgagees. The consequence is, that I believe, that Lord *Seaford*, if alive, would not have made this claim. His executors could not properly have forborne submitting the point to the consideration of the Court, but I am of opinion, that the claim of Lord *Seaford* must be postponed to that of the Plaintiffs, and that they are entitled to a declaration that they are prior mortgagees upon this estate.

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## ATTORNEY-GENERAL v. WILKINS.

July 1, 2.

**T**HIS was an information and bill, filed on the 16th of *December*, 1852, by the Attorney-General, at the relation of the minister and churchwardens of the parish of *East Ham*, in the county of *Essex*, and the minister and churchwardens themselves, to enforce payment of a rent charge of 3*l.*, issuing out of lands purchased by the Defendant and his brother.

The defence of being a purchaser for valuable consideration without notice is available in equity against a legal as well as against an equitable title and also as against a charity.

By indenture dated the 28th *July*, 1641, a rent charge or yearly sum of 3*l.* was granted by the Countess Dowager of *Westmoreland* to Sir *Thos. Holcroft* and others, their heirs and assigns, issuing out of two several pieces of marsh land, containing each about 2½ acres, situate in *Middle Marsh* in the parish of *West Ham*, payable half-yearly on *Lady-day* and *Michaelmas*, in equal portions, with powers of entry and distress, upon trust, after her decease, to pay to the minister of *East Ham* for the time being twenty shillings for preaching a sermon, and ten shillings to the churchwardens, that they might pay yearly five shillings to the clerk or sexton of the parish, for keeping, cleaning and brushing the tomb of the Countess and apply the other five shillings to repair it.

Ultimately the rent charge became vested in Sir *Jacob Jerrard Downing*, who died on the 7th *February*, 1764, without having conveyed it to new trustees. By his will, dated the 12th of *August*, 1763, he made his wife *Dame Margaret Downing* his residuary devisee, and it was not now known in whom the legal estate was vested.

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The rent charge, however, was paid by the successive owners of the land on which it was charged, down to *Michaelmas*, 1832. By indentures of lease and release, dated respectively the 28th and 29th of *January*, 1833, the trustees of the will of *James Adams* (the then last owner of the land), in pursuance of a contract dated 1st *November*, 1832, conveyed the two pieces of marsh land to *Wm. Wilkins* and the Defendant *Thos. Wilkins* in fee. They continued seised thereof jointly, until the death of *Wm. Wilkins*; and *Thos. Wilkins* was now seised thereof jointly with his brother's devisees, but he refused to pay the rent charge.

The information and bill prayed, that the trusts of the indenture of 1641 might be performed and carried into execution; that it might be declared, that the charity was entitled to the rent charge, and that it might be ascertained out of what lands it was issuing and payable; that an account of what was due to the charity might be taken, and that the Defendant might be decreed to pay what should be found due for arrears, and the rent charge in future and the costs of the suit.

*Thos. Wilkins*, by his answer, stated, that neither the particulars nor conditions of sale, nor the abstract of title which was delivered to the purchasers, nor any deed or other muniment of title in their possession or power, contained any mention of or any reference to the alleged rent charge; that his brother and himself were *bonâ fide* purchasers without notice, and that if any rent charge existed, it was fraudulently concealed from them; that no payment or acknowledgment had ever been made by him, and he believed none had been made by any person in possession or in the receipt of the rents and profits, or by whom such rent charge, if payable, would have been payable, or his or their agents, within  
twenty

twenty years next before the information and bill, and he claimed the benefit of the Statute of Limitations, 3 & 4 *Wm.* 4, c. 27, and the other acts for the limitation of suits. He also said, that independently of the act, the Plaintiffs were not entitled, by reason of laches and delay in instituting proceedings, to enforce their claim; that they were not entitled, at all events, to more than six years arrears before filing the information; that they were not entitled to recover so much of the rent charge or arrears thereof as was alleged to be payable to the poor of the parish, and that they ought to establish, by sufficient evidence, the existence of the rent charge and the identity of the lands charged therewith.


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The payment for the half-year ending *Lady-day*, 1833, had been made by *Wm. Adams*, one of the two sons of *James Adams*, but in his affidavit he stated, that he had made the payment in question in ignorance of the rent charge being a charge upon the two pieces of land alone, and not upon the whole of his father's lands, and without the knowledge of his brother or the purchasers.

*Mr. W. M. James* and *Mr. Shebbeare*, for the Plaintiffs. The Plaintiffs are under the necessity of coming into a Court of Equity to enforce their rights, because the legal estate is outstanding in some person who is unknown. But this cannot prejudice their claim, which is founded upon a legal title, and which, therefore, cannot be defeated by a purchase for valuable consideration without notice; *Collins v. Archer* (a); *Rogers v. Seale* (b); *Williams v. Lambe* (c). Nor can the Statute of Limitations be set up as a defence to the claim, for the owner of

(a) 1 *Russ. & Myl.* 284. (b) *Freem.* 84. (c) 3 *Bro. C. C.* 264.

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of the land is a trustee for the charity; *Attorney-General v. Pargeter* (a); *Attorney-General v. Pilgrim* (b); besides which, twenty years had not elapsed between the time when the right of the Plaintiffs accrued and the filing of the information, whether the payment made by *Wm. Adams* at *Lady-day*, 1833, be held to bind the Defendant or not. If it should be held to bind him, the case is clear; and if it should not, it was then only that the Plaintiffs' right to demand the rent charge accrued, and the information, filed in *December*, 1852, was in time to save the statute.

Mr. *Roupell* and Mr. *Sheffield*, for the Defendant. The first question is, whether the Plaintiffs have any right to sue in equity at all, and it is submitted they have not; but passing over that point, the Defendant, in this case, is a purchaser for valuable consideration without notice, and this is a sufficient defence against the Plaintiffs' claim, even though they have a legal title. In support of this proposition, the following cases and authorities may be referred to:—*Jerrard v. Saunders* (c); *Wallwyn v. Lee* (d); *Gait v. Osbaldeston* (e); *Bowen v. Evans* (f); *Joyce v. De Moleyns* (g); *Payne v. Compton* (h); *Penny v. Watts* (i); *Burlace v. Cooke* (k); *Parker v. Blythmore* (l); *Sugd. V. & P.* (m). These authorities no doubt are in conflict with *Collins v. Archer*, *Williams v. Lambe*, and other cases; but the preponderance is in favour of the rule, that want of notice will be a defence to a purchaser though against a legal title. But supposing this not to be a sufficient defence, the Statute of Limitations is a bar in this

(a) 6 *Beav.* 150.  
 (b) 12 *Beav.* 57; 2 *H. & Tw.* 186.  
 (c) 2 *Ves. jun.* 454.  
 (d) 9 *Ves.* 24.  
 (e) 1 *Russ.* 158; *S.C.* 5 *Mad.* 428.  
 (f) 1 *Jon. & Lat.* 178.

(g) 2 *Jon. & Lat.* 374.  
 (h) 2 *Y. & C. Exch.* 457.  
 (i) 1 *M. & G.* 150; 1 *H. & T.* 266.  
 (k) *Freem.* 24.  
 (l) 2 *Eq. Ca. Abr.* 79, pl. 1.  
 (m) Page 107, 11th ed.

this case, to the relief prayed, for there has been no payment or acknowledgment of the rent charge, by or on behalf of the Defendant, within twenty years next before the filing of the bill. The sale took place in *November*, 1832, and the conveyance was made in *January*, 1833, and the rent charge was made payable at *Michaelmas* and *Lady-day*. It is clear, that after the sale and conveyance, no payment or acknowledgment by *Wm. Adams* or by any other person, without the sanction or authority of the Defendant, as owner, could bind him; and as the last payment was made at *Michaelmas*, 1832, and the statute begins to run from the last receipt, the twenty years had elapsed before the filing of the information on the 16th *December*, 1852. But it is said, the statute is no bar in the case of a charity, and that the Defendants cannot avail themselves of it. In support of this argument, the cases of the *Attorney-General v. Pargeter* and *Attorney-General v. Pilgrim* have been cited; but in those cases, there was notice that the property was charity property, and there was also a breach of trust, neither of which circumstances is to be found here. Even if the Plaintiffs' remedy were not barred by the statute, they have been guilty of such laches and delay in asserting their rights, as to disentitle them to relief in a Court of Equity. They cited the *Commissioners of Charitable Donations and Bequests v. Wybrants (a)*; *Attorney-General v. Backhouse (b)*.

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Mr. James, in reply. The fact of being a purchaser for valuable consideration without notice, constitutes no defence to a legal title, there are numerous authorities even in the case of a rent-charge itself; *Shelford on Mortmain (c)*. The principle is, that if the purchaser

(a) 2 *Jon. & Lat.* 182.

(b) 17 *Ves.* 291.

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(c) Page 298, and the cases there cited.

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purchaser has both law and equity on his side, the Court will not deprive him of his better legal right, if he has an equal equity; but here the Attorney-General is not asking him to give up any legal right, for he bought the land charged with this payment, and which now remains a charge upon it, unless it is barred by the Statute of Limitations. This Court often gives a remedy in cases of legal right, as in cases of partition, &c.; or to enforce a rent, when the deed creating it is lost; *Collet v. Jaques* (a); or where it is doubtful out of what lands ancient quit rents are issuable; *Duke of Bridgewater v. Edwards* (b). In this case it is not known in whom the legal estate is vested, and therefore the Attorney-General has a right to seek redress in this Court. But the Crown may sue in any Court even to enforce a legal right; for it is the prerogative of the crown, as *parens patriæ*, which it may exercise, either on its own behalf or on that of a charity, and relief in the case of charities is constantly given in respect of rent charges, though a legal remedy for it may exist. The case of *Collins v. Archer* (c), has been acquiesced in, and has not been shaken by any authorities since. The 24th and 25th sections of the 3 & 4 *Will.* 4, c. 27, do not apply to the Crown or to charities.

*The MASTER of the ROLLS.*

I have had an opportunity of looking into these questions, and will presently express my opinion on them severally. There are several points of considerable interest on this information, but it will be unnecessary, in the view I take of it, to consider more than one. The information was filed to enforce a legal right  
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(a) 1 *Ch. Ca.* 120. (b) 6 *Bro. P. C.* 368. (c) 1 *R. & M.* 284.

to a rent charge, and the defences set up in answer are, first, a purchase for valuable consideration without notice, though it is not formally pleaded; and, secondly, that the claim is barred by the Statute of Limitations. There was a preliminary objection raised as to the right of the Plaintiffs to sue in this Court at all, on the ground that their title was a purely legal title. With respect to the legal rights, there is no doubt, that this Court enforces them in many cases, and that it will grant relief in case of a legal rent charge, where the right cannot, from some cause or other, be enforced at law. As, for instance, where there is a confusion of boundaries, or where it is not known out of what land the rent charge issues. In this case, however, there is no confusion of boundaries, and the lands out of which the rent charge issues are known. But it is said, that there is some difficulty, because there are no trustees, and no person who can bring an action. The answer to that is, that an application might have been made to the Court to appoint new trustees, and to vest the rent charge in them; and the trustees thus appointed might then have taken such proceedings in a Court of Law as they thought fit. But I express no opinion on this point, or as to the Statute of Limitations constituting a bar to the claim, for I am of opinion, that the defence of a purchase for valuable consideration without notice is a good defence to this bill. Though the earlier authorities are certainly contradictory, yet the later decisions are very strong upon this point, and support such a defence; and I think, upon principle, that it is but reasonable that it should prevail. This defence is the mere creature of a Court of Equity, and does not exist at law. There, if a person having a legal title to land or to a rent charge seeks to enforce that title, it is no defence to say, I purchased that land or that rent charge; and though

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you may have a legal title, still, as against me, you cannot recover at law. His legal title will prevail notwithstanding. But a Court of Equity holds, that it is not equitable for a person who has bought for valuable consideration without notice of any claim, to be deprived of that for which he has paid his money, nor will it (as expressed by Lord *Eldon* in *Wallwyn v. Lee*, and as was also said in *Joyce v. De Moleyns*) give any assistance against a purchaser for valuable consideration without notice, to a party claiming against him. But it is said, that this proposition, expressed in that general and extended sense, cannot be maintained, but that it must be confined within these limits, namely, that the Court will afford assistance against a purchaser for value, when the claim made against him is a legal and not an equitable claim. I am, however, unable to see why the rule should be limited only to cases where the right is merely equitable, and not be extended to the cases where it is legal. I cannot concur in the observations made in the argument in *Collins v. Archer*, that a Defendant, in order to avail himself of a defence of being a purchaser for value without notice, must either have a legal right, or a better right than the Plaintiff to call for the outstanding legal estate, and that consequently such a defence can never be made use of against the Plaintiff who relies upon the legal title. The case of *Penny v. Watts* is an authority against that proposition, because there was in either no legal estate, and it was not determined which of the two had the better right to call for the legal estate. The cases of *Wallwyn v. Lee* and *Joyce v. De Moleyns* expressly determine, that the defence of purchase for value without notice is a good defence, where the right sought to be enforced is a legal right; and I have in vain endeavoured to discover upon what ground it can be held, that it is not a defence  
against

against a legal claim in this Court. This Court certainly does not favour legal any more than equitable rights, but rather the contrary; and the cases which involve the consideration of legal rights are few as compared with those involving equitable rights: but in the case of a purchase for value without notice, the principle of the Court is, neither to afford assistance, nor to do anything to prejudice the rights. It will not afford assistance against the purchaser, and it will not, at his instance, restrain any person from proceeding against him, but it will leave all parties to their remedies at law.

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There are many cases, amongst which are *Rogers v. Seale*, *Williams v. Lambe* and *Collins v. Archer*, in which it has been held, that a defence of a purchase for value without notice is a good defence against a person seeking to enforce a legal right.

On the other hand, and opposed to these, are the cases of *Purker v. Blythmore*, *Jerrard v. Saunders*, *Gait v. Osbaldeston*, *Wallwyn v. Lee*, *Joyce v. De Moleyns* and *Penny v. Watts*, eight or nine cases, which more or less determine the contrary.

It is therefore necessary to consider the principle upon which the Court proceeds. My opinion is, that it proceeds on this: that when you once establish that a person is a purchaser for value without notice, this Court will give no assistance against him, but the right must be enforced at law. It is true, in this case, that the Defendant has not purchased the rent charge; but he bought the estate believing he was buying it without any rent-charge upon it. If, therefore, the Plaintiffs have a legal right, they must enforce it at law. The means of doing so exist in this case. Under the late statutes, trustees might have been appointed of  
 this

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this charity and the legal estate vested in them, and they might then have proceeded effectually to enforce their rights in a Court of Law. I think this information fails, and it must therefore be dismissed, but without costs.

The SHEFFIELD Gas Consumers' Company  
 (registered) v. HARRISON.

July 4.

The Defendant agreed, in writing, to take shares in a joint-stock company (which were transferable), "and to execute the deed of settlement when required." Specific performance was refused.

ON the 24th of *October*, 1851, and after the above company had been provisionally registered, the Defendant *Harrison* (the chairman of the committee of provisional directors) made a written application to the provisional committee for one hundred shares. This application proceeded as follows:—"And I hereby undertake to accept the same, and to pay the deposit thereon, *and to execute the deed of settlement* when thereunto required." He afterwards paid the deposit on such shares. The formalities and requisites being complied with, the deed of settlement was approved of by the provisional directors (*Harrison* being absent though summoned to attend) and by the Registrar, and the complete registration of the company was, on the 10th of *February*, 1852, duly certified by the Registrar of joint stock companies. The Defendant was returned to the Registrar as a provisional committee man and as a subscriber, and such returns had been duly registered.

Three calls of ten shillings per share were afterwards made, but the Defendant refused either to pay them or to execute the deed of settlement.

The

The Plaintiffs filed this claim, praying to have the agreement specifically performed by the Defendant, by the execution of the deed of settlement and payment of the three calls. The Defendant, by his affidavits, objected that the deed was not in conformity with the prospectus in various particulars, but this defence was not entered into. As to the transfer of shares, the deed provided, that "the board of directors should, within fourteen days after notice, accept or refuse any proposed transferee of shares, and who, being accepted and having executed the deed, was entitled to be registered as a shareholder. But in case the board rejected the proposed transferee, and should not, within fourteen days, find some other eligible person to take the shares at the market price, it was incumbent on the board to accept and register the transferee originally proposed."

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Mr. Daniel and Mr. Terrell, in support of the claim. Three objections have been raised to this claim: first, that this is not such a contract as the Court will decree to be specifically performed; secondly, that the deed of settlement is not in conformity with the prospectus, in various particulars; and, thirdly, the delay in taking proceedings. The first objection, which is the only one worth serious consideration, proceeded upon the principle that there is no case, as it is alleged, in which the Court has decreed the specific performance of an agreement to enter into a partnership. It would be dangerous, however, to apply the doctrine of partnership, without limitation, to the case of joint stock companies. It is true there is a dictum of Lord Eldon's in *Hercy v. Birch* (a), that "no one ever heard of this Court executing an agreement for a partnership, when the parties might dissolve it immediately afterwards;" but in 1 *Madd.*  
*Chan.*

(a) 9 Ves. 357; 2 Hovenden's Supp. 174.

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Chan. (a) it is said, that Lord *Eldon* afterwards expressed a doubt as to its correctness. But whatever may be the rule in cases of ordinary partnerships, there is no case in which the Court has refused to enforce specific performance of a contract such as this. On the contrary, if the company were about to be wound up, the Defendant's name would even now be placed upon the list of contributories to the debts and liabilities of the company, though he did not sign the deed of settlement, but was merely an allottee of shares upon which he paid the deposit. This shows that he would be considered as an existing partner. All acts done by a body of provisional directors may or may not be adopted after the complete formation of the company, at the option of the parties; but an allottee of shares, who has paid the deposit thereon, is bound as a member of the company. The defendant may be liable to an action at law, but that is no answer to a suit for specific performance; nor would it be right to refuse specific performance, even though an action would be a sufficient satisfaction, which in this case it would not. Besides, the Plaintiffs do not ask the Defendant to join the partnership, but only to execute the deed which he has contracted to execute, and take upon himself the responsibilities which, on the formation of the company, he agreed to participate in. He cannot at once withdraw from the partnership, but only after a limited time, during which the directors have a right to exercise an option of taking the shares. The Plaintiffs have also an equitable right to the calls for which they should not be put to the trouble of suing from time to time. They cited *Hutchison v. Surrey Gas Consumers' Company* (b).

Mr.

(a) Page 525, 3rd edit.

(b) 11 C. B. Rep. 689.

Mr. *R. Palmer* and Mr. *C. C. Barber*, *contrà*, were
not heard.

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I will not express any opinion as to whether this is a
good contract at law, or whether an action for damages
would or would not lie. I am however satisfied, that
this is not such a contract as a Court of Equity can
enforce. It is a contract to become a partner in a part-
nership, of which, according to the terms of the deed,
the Defendant could cease to be a partner within four-
teen days. I entertain no doubt, that this Court will not
enforce the specific performance of a contract to enter
into a partnership, which, so far as the Defendant is
concerned, he may dissolve immediately afterwards.
To specifically perform a contract of this description
would be merely nugatory.

It is said, that you must not assimilate these compa-
nies to ordinary partnerships. It is true that in many
respects they differ, because the legislature has given
them means of enforcing equities, which, where partners
are numerous, one individual partner is unable to en-
force, consistently with the ordinary rules of pleading
and practice in this Court. But in all other respects,
they must be treated and considered as partnerships.

Cases have been cited to me to show, that this gen-
tleman would be a contributory. Upon that I express
no opinion, for it is obvious that the case of con-
tributories is perfectly distinct from that which I have
now to consider. The terms of an act of Parliament
regulate who are to be contributories. It is possible that
creditors may have advanced money or supplied goods
upon the faith of the Defendant's name, and on the
belief

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belief of his being a member of this partnership, and it may be very inequitable that one, who has allowed his name to be used, should not contribute with the other shareholders in paying liabilities incurred, by his permitting his name to be used. That is a totally different equity from that of compelling a Defendant to execute a deed, and to become a partner in a concern unwillingly, and which partnership he may immediately put an end to.

The last case cited by Mr. *Daniel, Hutchinson v. The Surrey Gas Consumers' Company*, seems to show, that this is no contract or agreement at all, and that it could not be enforced in a Court of Law, but I am satisfied that if there is any right, it is only to be enforced there.

It is also to be observed, that although these joint stock companies have existed a great number of years, and cases of this description must have occurred frequently, yet I am not referred to, nor do I believe I could be referred to, any case in which such an attempt as the present has ever been made.

This is, therefore, a purely speculative claim, and it must be dismissed with costs.

NOTE.—This claim was drawn on the authority of *England v. Curling*, 8 *Beav.* 129, which, however, was not cited in the argument.

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MACNAB v. WHITBREAD.

July 5.

DUNCAN R. MACNAB gave and bequeathed all his freehold, leasehold and other personal property, whether in possession, remainder or expectancy, unto the Plaintiff, *Charlotte Macnab*, her heirs, executors, administrators and assigns, *absolutely* and for ever, *in the full assurance and confident hope* that she would bring up his children in the fear of God, and *educate and provide for them*, the same as it would have been his intention, should it have pleased God to spare his life.

A testator gave all his real and personal property to his widow, her heirs, &c. "absolutely, and for ever, in the full assurance and confident hope" that she would bring up, educate and provide for his children, as it would have been his intention" if living. Held, that though the words "full assurance and confident hope" would create a precatory trust, yet the trusts were too obscure to carry into effect, and that the widow took absolutely.

The question was, whether the widow took the property absolutely, for her own benefit, or subject to a precatory trust in favour of the testator's children?

Mr. *R. Palmer* and Mr. *Heberden*, for the widow. "There is no trust for the children. The gift is to the widow, her heirs, &c. "absolutely," which is quite inconsistent with there being a trust for other persons. Again, the trust is too uncertain to be carried into execution, for how can it be ascertained what the intentions of the testator would have been if living? The object of the testator was, to place his widow in the same situation as himself, with an absolute power and control both over his property and children.

They cited and commented at length on the following

cases :



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cases : *Abraham v. Alman* (a); *Sale v. Moore* (b); *Curtis v. Rippon* (c); *Hoy v. Masters* (d); *Bardswell v. Bardswell* (e); *Pope v. Pope* (f); *Meredith v. Heneage* (g); *Benson v. Whittam* (h); *Knight v. Knight* (i); *Winch v. Brutton* (k); *Williams v. Williams* (l); and see *Webb v. Wools* (m).

Mr. *W. D. Evans*, for a trustee.

Mr. *Godfrey*, for the two children. There is a trust in favour of the testator's children. The whole gift is subject to "the full assurance and confident hope" in their favour, and these words are quite sufficient, upon the authorities, to create a trust for them. Secondly, the trust can be ascertained by a reference as to what would be proper education and provision for them. Either the widow has a large discretionary power, or is entitled for life, with remainder to the children, with a power of selection to her. He cited *Broad v. Bevan* (n); *Brown v. Casumajor* (o); *Raihes v. Ward* (p); *Briggs v. Penny* (q); *Woods v. Woods* (r).

Mr. *Jackson*, for an incumbrancer.

The MASTER of the ROLLS.

This is a very difficult and obscure will. It is almost impossible to decide such cases by others, but I have
 no

- (a) 1 *Russ.* 509.
- (b) 1 *Sim.* 534.
- (c) 5 *Mudd.* 434.
- (d) 6 *Sim.* 568.
- (e) 9 *Sim.* 319.
- (f) 10 *Sim.* 1.
- (g) 1 *Sim.* 543.
- (h) 5 *Sim.* 22.
- (i) 3 *Beav.* 148.

- (k) 14 *Sim.* 379.
- (l) 1 *Sim.* (N. S.) 358.
- (m) 2 *Sim.* (N. S.) 267.
- (n) 1 *Russ.* 511, n.
- (o) 4 *Ves.* 498.
- (p) 1 *Hare*, 445.
- (q) 3 *Macn. & G.* 546.
- (r) 1 *Myt. & Cr.* 401.

no doubt that the words "full assurance and confidence" are sufficient to create a trust. I am of opinion that the words that she will "educate and provide" for them, "in the same manner as it would have been my intention, should it have pleased God to spare my life," are too obscure to carry into effect. On the whole, I think, that I should best carry into effect the intention of the testator, by saying, that the widow took an absolute interest in the property, and I must make a declaration accordingly.

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CARTWRIGHT v. SHEPHEARD.

THE testator, by his will, appointed *Shepherd, Cartwright* and *Kinder*, trustees and executors of his will, to whom he bequeathed a legacy for their trouble. And he devised and bequeathed his real and personal estate to them upon certain trusts.

By his first codicil, after reciting his will, he revoked the appointment of *Kinder* as *executor and trustee*, and he devised and bequeathed his real and personal estate to *Shepherd, Cartwright* and *Newport*, upon the trusts declared by his will, and he appointed *Newport* one of his executors.

By a second codicil, he expressed himself thus:—I desire *Samuel Cartwright* and *William Kinder*, named

July 7.

The testator appointed *A.*, *B.* and *C.* his executors and trustees, and devised and bequeathed to them his real and personal estate in trust. By a codicil, he desired that *A.*, named in his will as "executor," be no longer such, and he nominated *D.* to succeed him, but he made no alteration in the devise. Held, that *A.* still remained a trustee of the will.

The testator appointed *A.*, *B.* and *C.* to be trustees and executors. He revoked the appointment of *C.* as executor and trustee by his first codicil. By a second codicil he revoked the appointment of *B.* and *C.* as executors, but ratified his will except as altered thereby. Held, that the first codicil was not revoked, and that *C.* was not a trustee.

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in my will as my *executors*, be no longer regarded as such, and in their place I nominate *C. Cave* and *R. Ellis* to succeed them." "And I ratify and confirm my said will, except as the same is altered hereby."

The question was, whether the Plaintiff *Cartwright*, though his appointment as executor had been revoked, was still a trustee of the will.

Mr. *Bevir*, for the Plaintiff, argued, that the revocation was limited to the office of executor, and that the character of trustee remained. He cited *Graham v. Graham (a)*.

Mr. *R. Palmer*, Mr. *Roupell* and Mr. *Renshaw*, *contra*, contended, that the Plaintiff was neither executor nor trustee; that the two characters were inseparably connected; and that the testator had, in a short way, expressed his intention of excluding him from both offices.

Mr. *Dickinson* and Mr. *Giffard*, for other parties.

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Your argument must go to this extent, that the second codicil revoked the devise to the Plaintiff. I am of opinion that there is no revocation of the devise of the real estate, and that *Cartwright* still remains a trustee.

Mr. *Welch*, for *Kinder*, argued, that as the second codicil ratified and confirmed the will, except as it was altered

(a) 16 *Beav.* 550.

altered by the revocation of the appointment of *Cartwright* and *Kinder*, as executors only, it revoked the first codicil, thus leaving *Kinder* a trustee.

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I am of opinion that the second codicil does not affect *the* first. What is ratified is the will, as it then stood *varied* by the first codicil. There ought to be an express *revocation* of the first codicil, to effect the purpose for *which* you argue.

FORD v. BATLEY.

July 8.

THE testator directed his executors, immediately after his decease, to purchase, in their names, from the Commissioners for the Reduction of the National Debt, by the act 10 *Geo.* 4, c. 24, empowered to grant annuities, or of or from any public company, duly empowered by act of parliament, charter, or otherwise, to grant annuities, an annuity of 30*l.* for the Plaintiff.

A testator directed his executors to purchase, in their names, an annuity from government or any public company, for *A. B.* Held, that *A. B.* was entitled to have a government annuity purchased, and, at his option, to take the price in lieu of the annuity.

The executors handed over the residue to the residuary legatee, without making the investment, there being some doubt as to the identity of the annuitant.

The Plaintiff, however, ultimately established his right to the annuity.

Mr. *Craig* and Mr. *Southgate*, for the Plaintiff. First, the annuitant has a right to select the security upon which the annuity shall be purchased, and, secondly, he has a right to elect to take the purchase-money instead of

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of having the annuity purchased. He elects to have a government annuity, and insists on having the money necessary to purchase it.

Mr. *Goodeve*, *contrà*. The testator has given his executors a discretion as to the mode of purchasing the annuity. This should be exercised in a manner the least prejudicial to the estate, and the annuity should therefore be purchased from a public company, whose terms are less onerous than those of government. Secondly, the testator has directed the annuity to be purchased in the names of the executors. His directions they are bound to follow; and to allow the Plaintiff to take the money would be opposed to the clear intention of the testator, who intended to give an annuity and not a legacy. He referred to *Blewitt v. Roberts* (a).

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The annuitant is entitled to have the best security for his annuity, which is, a government security. I am, therefore, of opinion, that he is entitled to a government annuity.

I also think he is entitled to have such a sum as would be required to purchase an annuity from the Commissioners for the Reduction of the National Debt, for it is obvious, that if an annuity were purchased, he might sell it immediately afterwards (b).

(a) *Craig & Ph.* 274.

(b) *Dawson v. Hearn*, 1 *Russ. & M.* 606.

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STEVENS v. VAN VOORST.

July 6, 12.

UPON the marriage of *Henry Van Voorst* and *Sarah B. Stevens*, in 1807, each, by agreement, laid out the sum of 1,000*l.* in the purchase of Bank Stock. The husband's produced 433*l.* 5*s.* 5*d.* stock, and the wife's produced 431*l.* 14*s.* 7*d.* These two sums, amounting together to the sum of 865*l.* Bank Stock, were, by the settlement, vested in trustees, upon trust for the husband for life, with remainder to the wife for life, with remainder to the children, and if none (which happened), then upon trust, after the death of the survivor, to pay the 433*l.* 5*s.* 5*d.* stock unto the executors or administrators of the husband, and the sum of 431*l.* 14*s.* 7*d.* stock to such persons as the wife should appoint, and in default to her next of kin.

A sum of 865*l.* stock, partly belonging to the husband and partly to the wife, was settled (subject to the interests given to the husband, wife and children) as to the husband's part on the husband's executors, and as to the wife's to her next of kin. The settlement contained a covenant, that the after acquired property of the wife should be settled on like trusts. Held, that the husband and wife's representatives were, under the ultimate limitation, entitled to the wife's after acquired property in proportion to their interests in the 865*l.*

And it was thereby agreed and declared, between and by the said parties thereto, and the husband covenanted with the trustees, that in case the said intended marriage should take effect, and any personal estate should, by will, settlement, donation or otherwise howsoever, come to or devolve upon *Sarah Bridges Stevens*, or the said *Henry Van Voorst* in her right, they the said *Henry Van Voorst* and *Sarah B. Stevens*, and each of them, would, by such deeds, &c., as by the Counsel of the said trustees, &c. should be required, assign, &c. all such personal estate unto the trustees, "upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisos and agreements, as were thereinbefore

Covenant to settle after acquired property of the

wife, held to extend to property acquired after the death of the husband.

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fore declared and contained, of and concerning the said sum of 865*l.* Bank Stock, or such of them as should be then subsisting and undetermined, or capable of taking effect."

By the death of *Thomas Stevens*, the father of Mrs. *Van Voorst*, she became entitled to a share in his residuary estate, and about 1,743*l.* in different stocks were transferred unto the names of the trustees of the settlement, who, in 1811, by deed declared they held them upon the trusts of such settlement.

There was no issue of the marriage. The husband died in 1828, and the wife in 1853. The question now raised was, how the 1,743*l.* was to be dealt with, as between the representatives of the husband and the wife. The Plaintiff represented the wife's estate, and the Defendants that of the husband.

There were also two sums of 333*l.* 6*s.* 8*d.* consols, and 18*l.* long annuities, standing in her name, but it was not known how or when she became possessed of them; but it was supposed, that she acquired them after the death of her husband.

Mr. *Willcock* and Mr. *H. Nichols*, for the Plaintiff, claimed the whole of the funds.

Mr. *Lloyd*, Mr. *Forster*, Mr. *Goodeve* and Mr. *Gordon*, for the Defendants, claimed a proportion of the fund.

The MASTER of the ROLLS reserved his judgment.

The

The MASTER of the ROLLS.

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July 12.

Two questions arise in this case; first, whether any portion of the property acquired during the coverture passed to the husband, under the trusts of the settlement, and next, whether any property acquired by the wife subsequently to the coverture is subject to the same trusts. It is to be observed, that, with respect to the property acquired during the coverture, the whole might be taken by the husband, and that this arrangement was in derogation of his rights. It is admitted, in argument by the Plaintiff, who contends that all this belonged to the wife, that the trusts of the settlement do apply, to some extent, to these sums, that is, so far as regards the trusts in favour of the husband, wife and children, but they contend, that there they stop short, and that the words "such trusts, powers, &c., as were thereinbefore declared concerning the 865*l.* Bank Stock then capable of taking effect," do not apply, for that, in truth, there were no trusts thereinbefore declared which were then capable of taking effect.

I am of opinion that it is impossible to stop short and say, that the ultimate trust in favour of the husband as to part, and of the wife in respect of the rest, is not to take effect. There is no principle by which I can qualify these words, so as to include them in favour of some objects, and exclude the ultimate trust for the husband. Here is a trust relating to the Bank Stock, which would be subject to little doubt; but it is said, that these trusts relate to Bank Stock only, and do not apply to different matters, and to totally different subjects. The answer is, that whatever the trusts of the Bank Stock may be, they are to be applied to this stock, so far as they are applicable. These trusts are,

1853. *that so much of the 865*l.* as amounts to 433*l.* 5*s.* 5*d.* shall go to the husband absolutely, and the residue to the wife. My opinion is, that, according to the proper construction, I must divide these sums in the proportions of 433 to 431, although it is a singular division.*

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Having come to this conclusion, I was desirous to confine the operation of the covenant to that property which accrued to the wife during the coverture. I have looked in vain for any words so limiting it, and I cannot do so without introducing express words for that purpose. I may speculate that it might have been intended, but I cannot decide on a speculation of probabilities, for I think it is not proper to go beyond the words of the clause, even if that may lead to results, which it is not probable the persons could have intended.

I am, therefore, of opinion, that all the property acquired by the wife, subsequent to the marriage, is subject to the trusts of the settlement; and as there was no issue, it must be divided in the proportion of the Bank Stock.

STONES v. ROWTON.

July 8, 12.
 Two retiring trustees held not authorized to appoint two new trustees, under a power given to surviving or continuing trustees.

BY a settlement made in 1847, real estate was conveyed to *Jefferson* and *Barrett*, upon certain trusts, which it is unnecessary to state. The settlement contained

Two trustees were originally appointed by a settlement, which contained a power that if the trustees or either of them should be desirous of being discharged, the tenant for life, "and after his decease, the surviving or continuing trustees or trustee" might appoint any other person or persons to be a trustee or trustees, in the stead of the trustee or trustees so desiring to be discharged. Held, that this did not authorize the two original trustees, after the death of the tenant for life, to retire together and appoint two new trustees in their stead.

contained a power to appoint new trustees, which was in the following terms:—"And it is hereby declared, that if the said trustees hereby appointed, or either of them, or any trustee or trustees to be appointed as hereinafter is mentioned, shall die, or be desirous of being discharged, or refuse or become incapable to act, then and so often, the said *John L. Richardson* (the tenant for life), during his life, and after his decease the surviving or continuing trustees or trustee, or the executors and administrators of the last acting trustee, may appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying or desiring to be discharged, or refusing or becoming incapable to act. And upon every such appointment, the said trust premises shall be so transferred that the same may become vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case may require. And every such new trustee shall, either before or after the said trust premises shall have become so vested, have the same powers, authorities and discretion as if he had been hereby originally appointed a trustee."

After the death of *J. L. Richardson*, the two original trustees, being desirous of retiring from the trusts, executed an indenture, dated the 14th of *January*, 1852, whereby they appointed two new trustees in their place, and conveyed the property to them.

The new trustees having joined in a sale of the property, under a power of sale contained in the settlement, a question arose between the vendors and purchasers, whether the new trustees had been duly appointed. It was contended, that the settlement did not authorize two retiring trustees to appoint two new trustees in their place. The point was discussed upon a special case.

Mr.

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Mr. *R. Palmer* and Mr. *W. W. Cooper*, for the Plaintiffs, the trustees and vendors. The appointment is valid and authorized by the power. The expression "trustees," in the plural, is used throughout the power to appoint new trustees, so that the two trustees might retire together and appoint two new ones in their place. The words "surviving trustees," in the plural, cannot refer to a survivorship as between the two, and can only be satisfied by making them refer to the event of their surviving the tenant for life, who alone, while living, could exercise the power. Again, the expression "continuing trustees" can have no meaning, it being considered as referring to trustees "continuing" until the appointment of the new ones, that is, until the power has been executed.

The question, however, is one of mere form, and not of real substance, for it is clear that one of the original trustees might have retired on one day, and the other original trustee on the following day, and two new trustees might have been appointed on two successive days; the effect would be the same, with this inconvenience, that two deeds and two conveyances would be necessary instead of one. The result would in substance be the same, whether produced by one deed or by two of different dates, and the transaction, if valid in one case, would be equally so in the other. They cited *In re Hadley's Trust* (a); *Miller v. Priddon* (b); *Cafe v. Bent* (c).

Mr. *Speed*, *contra*. Powers of this description are construed strictly, the trustees having no further authority to place others in their stead than that which is given to them by the express words of the instrument.

The

(a) 5 *De G. & Sm.* 67.

(b) 1 *De G. M. & G.* 335.

(c) 5 *Hare*, 24.

The effect of this power was to authorize the survivor of the two trustees, in case of the death of either, and the continuing trustee, in case of the retirement of one, to appoint a new trustee, in the place of the deceased or retiring trustee. But it did not sanction the retirement of the two together and the simultaneous appointment by them of two new trustees. The settlor might have reposed confidence in a sole trustee, who continued to discharge his duties, but not in one who abandoned his trust; *Sharp v. Sharp* (a). The practice of Conveyancers, in such a case, is to make two separate appointments; and if the power requires such a formality, it is substantial. The word "trustees," in the plural, must have been used improvidently, but it may be satisfied by holding that there may be more than two trustees appointed by the Court. He cited *Meinshagen v. Davis* (b); *Townsend v. Wilson* (c); *MacAdam v. Logan* (d); *Earl of Lonsdale v. Beckett* (e).

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Mr. R. Palmer, in reply.

The MASTER of the ROLLS. I will consider this case.

The MASTER of the ROLLS.

July 12.

I thought the question in this cause of sufficient importance to induce me to postpone my judgment, to enable me to consider it carefully, with reference to the authorities. It arises on the power to appoint new trustees, and the question is, whether, under this settlement,

(a) 2 B. & Ald. 405.
(b) 1 Coll. 335.
(c) 1 B. & Ald. 608.

(d) 3 Bro. C. C. 310.
(e) 4 De G. & Sm. 73.

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ment, it is possible for the two trustees, originally appointed by the settlement, to appoint two new trustees in their place, by one and the same deed, i. e. whether they are "continuing" trustees. The words of the clause are these. [*His Honor stated them.*] It is true, as has been argued, that these powers are construed strictly, but in this sense, that the donee can only do that which the power enables him to do; but in every other sense, the words of such powers are to be construed like every other instrument. The question therefore is, whether the fair construction of this power gives to the donees the power of doing that which is claimed. It has been argued, that the donor has given express power to the two trustees to appoint two new trustees in their own place; and in support of that, two cases are cited, namely, *In re Hadley's Trust* (a) and *Miller v. Priddon* (b). The words, however, were not the same; and in one case the Court proceeded on the fact, that the clause expressly empowered the retiring trustee to appoint in his place.

I am of opinion, that the intention must be clearly expressed in the instrument; but after reading the clause, I do not see any such intention expressed on the present instrument. It was, in my opinion, correctly observed by Mr. *Speed*, that to enable the trustees to appoint under this clause, you must read "continuing" as synonymous with "retiring." That would be too great a violence upon the language used, which is "surviving or continuing trustees." It is said, that they might be satisfied by holding it referred to surviving the tenant for life; but the force of that observation is removed by the fact, that the person to be appointed is to act jointly with the surviving or continuing trustee. It is

more

(a) 5 *De G. & Sm.* 67.

(b) 1 *De G. M. & G.* 335.

more rational to refer these words to the survivorship between the two trustees, than to the fact that the Court of Chancery might appoint a greater number of trustees than those originally appointed. In the direction to transfer the trust property, so as to vest in the new trustees, the word "solely" refers and applies to the case of the executor of a last-acting trustee appointing new trustees, for which express power is given.

1853.

STONES
v.
ROWTON.

It is to be observed, that in determining cases of this description, one is speculating and trying, by nice and refined distinctions, to discover the meaning of persons who never contemplated the case, inasmuch as the difficulty has arisen from a careless mode of filling up common forms. The Court, in so doing, is apt to impute to persons intentions and ideas which never entered into their minds.

On the whole, I am of opinion that I must treat this as an ordinary clause, giving the continuing trustee power to appoint a new trustee in the place of the retiring trustee or trustees. Though there may be some absurdity in requiring two deeds to be executed, in order to appoint two new trustees, yet I am of opinion, that if the power is so worded it must be followed.

I am of opinion that the new trustees are not properly appointed, and I must answer the case in that form.

As to costs, the Court very reluctantly gives any decision as to costs on special cases. The parties generally arrange that matter, and the Court cannot deal with a special case as with a cause.

1853.



GRIESBACH v. FREMANTLE.

July 13.

A testatrix gave her real and personal estate to three trustees, upon trust, as soon as they, in their discretion, should think most advantageous, to sell and convert into money her real estate, and pay her debts and legacies. She gave the residue of her estate and effects to her son J. B. Held, that J. B. took the residue of the realty in the character of personalty.

A. B., who was one of the trustees, paid the debts and legacies, except one annuity, and remained in possession sixteen years and died intestate. Held (having regard to his acts, and notwithstanding he was both co-trustee and owner), that the property was reconverted into realty and passed to his heir.

THE testatrix devised and bequeathed all her freehold and copyhold at *Sunbury* and elsewhere, and her personal estate to her eldest son *John Bishop*, and two other persons, their heirs and assigns, upon trust, "as soon after her decease as they in their discretion should think most advantageous, to sell and convert into money her freehold, copyhold and leasehold hereditaments and premises, and to stand possessed thereof, in trust to pay her debts and funeral expenses, and the legacies thereafter mentioned. She gave a number of large legacies, and two annuities of 40*l.* and 30*l.* And as to all the residue of "her estate and effects, of what nature or kind soever (subject to the payment of the said two annuities), she gave and bequeathed the same" to her son *John Bishop*, "his executors, administrators and assigns;" and she appointed *John Bishop* and the two other trustees her executors.

The testatrix died in 1832.

John Bishop, by permission of his co-trustees, entered into possession of the real estate at *Sunbury*. He satisfied the debts and legacies (except the annuity of 40*l.*), and continued to reside in the mansion and to receive the rents of the other part of the property until his death, in *May*, 1848, when he died intestate. A question then arose, whether *John Bishop*, at his death, held the *Sunbury*

Observation, that the interest of a witness is apt to mislead his recollection.

Sunbury property in the quality of real or of personal estate. His heirs claimed it as realty, his administrator as personalty. By this bill a declaration was prayed, that *John Bishop* was entitled to elect and had elected to take the property as real estate, and that on his death it descended upon his heir at law.

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FREMANTLE.

The acts principally relied on, as affecting his election, were as follow :—

He remained in the occupation of the house and premises and let the rest for sixteen years, and retained the title deeds. He paid the debts, legacies and annuities, except the annuity of 40*l.* a year, the annuitant being still living. In 1842, he laid out, in the alteration and repairs of the premises, a considerable sum, as one witness said, 2,500*l.*, and other witnesses stated a larger sum. He felled timber and diminished the garden, removed the green-house and increased the meadow; and in 1836, he advertised and attempted to sell the property, but without success. The two circumstances principally relied on were these:—In 1836, he gave a tenant notice to quit in these terms—"I require you to quit the occupation of the land *you hold of me*," &c.; and in 1847, upon an application from the Legacy Duty Office, in respect of the legacy duty on the proceeds of the real estate, if sold, *John Bishop* replied, "that he had not sold any of the real estates, but had retained the same to his own use, having satisfied all demands from the personal estate of the deceased." There were in addition some indistinct declarations in evidence, which, however, were not relied on by the Court.

Mr. Roupell and Mr. Elderton, for the Plaintiff, and Mr. Lloyd and Mr. C. Hall, in the same interest, claiming through the heir of *John Bishop*. First, the will creates

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creates no conversion of the real into personal estate, because the purposes for which the sale was directed were limited to the payment of the debts and legacies, and they being satisfied, the residue, "of what nature or kind soever," is given to *John Bishop*. If all the legatees had died in the lifetime of the testatrix, or if they had been satisfied, the Court would never have directed a sale. Secondly, if, however, the property was converted by the will, and *John Bishop* took it as personalty, still his acts were such as to establish a reconversion into realty. Very slight acts are necessary to establish an option to take as real estate; and here it is proved, that he was in possession of the estate and retained the title deeds for sixteen years; that he cleared the estate by payment of the debts and legacies; that he exercised acts of ownership over the property, by cutting timber, altering the garden, removing the hot-house, &c., and made a very considerable outlay; that he represented the property "as held of him," and distinctly stated, in reply to the application for legacy duty on the real estate, that he "had retained the same to his own use." These acts must be referable to his ownership, and not to his character of trustee, in which he would be committing a breach of trust. They are amply sufficient to effect a reconversion of the property.

The MASTER of the ROLLS.

I have no doubt that the will converted the property, even if the word "heirs" (a) is used. The Defendants, therefore, may confine themselves to this:—Was he in a situation to elect, and did he elect?

Mr. *R. Palmer* and Mr. *Osborne*, *contrà*. If no other

(a) It was doubted whether the word "heirs" was added to the gift to the son, but on reference it was found that it was not.

other person than *John Bishop* had been interested in the estate, he would then, without doubt, have been in a position to elect, but here the rights of the creditors, legatees and annuitants intervened, and until they were all satisfied, he could not, of his own will, resist an actual conversion. One annuitant remains unpaid even now, and she may be entitled to have the trust in her favour performed by a sale of the property. Again, his fiduciary character, as trustee, prevented his doing any act to the prejudice of those for whom he was a trustee. Secondly, he did not elect. The acts which are relied on, namely, his possession, receipt of rents, repairing and improvement of the estate with a view to a sale, &c. are quite consistent with his character of trustee. It is not a question of ownership, because it is admitted that he was the ultimate owner of the property, whatever might have been its character. The only inconsistent act is his letter to the comptroller of the stamps, but his object was simply to escape the legacy duty, if that were possible. The Court holds an even hand, in these cases, between the heir and next of kin, but when once the conversion into personalty has been established, the onus of proving a reconversion lies on the heir. Here, he has not satisfactorily made out his case.

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The cases cited were as follows—*Cruse v. Barley* (a); *Ackroyd v. Smithson* (b); *Amphlett v. Parke* (c); *Randall v. Bookey* (d); *Starkey v. Brooks* (e); *Chitty v. Parker* (f); *Robinson v. Taylor* (g); *Maugham v. Mason* (h); *Hill v. Cock* (i); *Wilson v. Major* (k); *Davies v. Ashford*

- (a) 3 P. Wms. 19, and note.
(b) 1 Bro. C. C. 503.
(c) 2 Russ. & Myl. 221.
(d) Prec. in Chanc. 162.
(e) 1 P. Wms. 390.

- (f) 2 Ves. jun. 271.
(g) 2 Bro. C. C. 589.
(h) 1 Ves. & Beames, 410.
(i) Ibid. 173.
(k) 11 Ves. 205.

1853. *v. Ashford (a); Pulteney v. Darlington (b); Van v. Barnett (c); Smith v. Claxton (d); Kennell v. Abbott (e); GRIESBACH v. Cookson v. Cookson (f); Crabtree v. Bramble (g); Cow- FREMANTLE. ley v. Hartstonge (h); Biddulph v. Biddulph (i); Griffith v. Ricketts (k); Kirkman v. Miles (l); Stead v. Newdigate (m); Wheldale v. Partridge (n).*

The MASTER of the ROLLS.

I think that this is a case of reconversion, and that the facts of this case establish an intention on the part of *John Bishop* to reconvert the property into realty.

It is unnecessary for me to state the grounds for my opinion, that this will effected a complete conversion of the real estate into personalty, because, assuming that to be so, I think there is a reconversion into realty.

I concur in what has been stated, that the Court holds no favour as between the heir at law and next of kin, in cases of this description. I am also of opinion, that *primâ facie* the property is taken by the heir, in the character impressed upon it by the will, and that if no intention is manifested to alter it, those representing him take it in the same character. I am of opinion, that if *John Bishop* had died within twelve months after his mother's death, the property would have gone to his personal representatives as personalty, in which character he took it. The question is, whether
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| (a) 15 <i>Sim.</i> 42. | (g) 3 <i>Atkyns</i> , 680. |
| (b) 1 <i>Bro. C. C.</i> 223. | (h) 1 <i>Dow</i> , 361. |
| (c) 19 <i>Ves.</i> 102. | (i) 12 <i>Ves.</i> 161. |
| (d) 4 <i>Mud.</i> 484. | (k) 7 <i>Hare</i> , 299. |
| (e) 4 <i>Ves.</i> 802. | (l) 13 <i>Ves.</i> 338. |
| (f) 12 <i>Clark & Fin.</i> 121 & 5 | (m) 2 <i>Mer.</i> 521. |
| <i>Beav.</i> 22. | (n) 8 <i>Ves.</i> 227. |

from *January*, 1832, to *May*, 1848, sufficient acts have not taken place to show, that he elected to take the property as real estate, and not in the character impressed on it by the will.

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FREMANTLE.

It was admitted, and could not be denied, that he was in a situation to make an election, if all the debts and all the legacies had been paid. They were paid with the exception of one annuity, and the circumstance that there was power to raise this annuity by a mortgage on the property would not put him under the obligation of taking the property as personal estate. The annuitant could not have compelled a sale, if *John Bishop* had set apart sufficient funds to provide for her annuity. I am of opinion, that he was in a situation to make his election.

That being so, the burthen of proof is then thrown on the party who contends that a reconversion has taken place; for *John Bishop* having taken these lands as money, the burthen of proof is on the Plaintiff to show an intention to elect to keep it as realty, or, in other words, to remove the trust for conversion impressed on the property by the testatrix.

I should have thought that the uninterrupted possession and receipt of the rents for sixteen years would have been sufficient for that purpose, if he had not been a trustee, which renders it ambiguous. The facts which struck me forcibly are those which I am about to mention. He attempted to sell the property in 1836, and it being in a very dilapidated state, he laid out considerable sums in repairing it. One witness says 2,500*l.*, another 3,000*l.* Whether he did this to forward the sale, or for the more convenient occupation of it by himself and his family, does not appear. I do not, however,

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however, rely on this act as conclusive; but the circumstances, taken in a cluster, and you must take them altogether, help one another. I do not however think, that a person about to sell would lay out so large a sum of money as 2,500*l.* on a property, for which he did not expect to get more than 11,000*l.* if well sold. I draw a contrary inference from that which has been insisted on. I do not think it probable that anything would be gained by laying out so large a sum as 3,000*l.* on the property before the sale, for the purchaser would naturally prefer laying out the money himself. The most profitable mode would probably be to sell without repairing, though it might depend on the nature of the case. I place very little reliance on the statement, that he would be glad to sell for 11,000*l.*, and I also place but little reliance on the recollection of Mrs. *B.*, for the interest of witnesses is apt to mislead their recollection. I must decide on acts not ambiguous or liable to misconstruction. I have this fact, that considerable expenses were incurred in the repairs, for the purpose of family occupation, and that alterations were made which were not of such a species as are usual in anticipation of a sale, such as removing a hothouse, altering the garden, and cutting ornamental trees. All these could not be for the purpose of sale.

I rely most on the two documents; the first of which is, a notice to the tenant to quit, in which he speaks of "the land you hold of me." Above all, the answer to Mr. *Trevor's* application for legacy duty for the land, to which his answer, on the 20th *April*, 1847, is, "I have not sold any of the real estates, *but have retained the same to my own use.*" A more unqualified and unambiguous expression cannot be used. It cannot be denied that he was in a situation to elect, and in answer to the application for the legacy duty on the proceeds of the sale,

sale of the real estate, he says, "I have retained the same to my own use." This is confirmatory of the facts which had already occurred. He may, it is true, have made this statement in order to escape payment of legacy duty, but the fact of his making the statement, in the same letter in which he asked whether he would be liable to legacy duty, does not, in my opinion, vary the inference properly to be drawn from the expressions used.

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GRIEBBACH
v.
FREMANTLE.

As to the attempted sale, it is to be observed, that a person may elect to hold property as land, and yet he may afterwards be induced, by an alluring price, to sell the property.

I am therefore of opinion, that it has been proved, that *John Bishop* has exercised his election to take the property unconverted and discharged from the trust for conversion impressed on it by the will of *Mrs. Bishop*.

On the death, therefore, of *John Bishop*, it passed to his heir at law, *Alexander G. S. Bishop*.

IVISON v. GRASSIOT.

THE Defendant having elected that the evidence should be taken orally,

Mr. Lloyd, on behalf of the Plaintiff, moved, under the 15 & 16 Vict. c. 86, s. 36, for leave to use, at the hearing,

use at the hearing affidavits already filed is irregular. The particular facts or circumstances proposed to be proved by affidavits should be specified both in the notice of motion and in the order.

July 14.
When the evidence in a cause is taken orally, a general application, under the 36th section of the 15 & 16 Vict. c. 86, to be at liberty to

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Iverson
v.
Grassiot.

hearing, affidavits which had been filed on a former application for an injunction, for a receiver, and for payment of money into Court.

Mr. *Eddis*, *contrà*.

The MASTER of the ROLLS.

The meaning of this clause is, that where there are particular facts or circumstances, which the Defendant either does not dispute or has no interest in disputing, the Court, notwithstanding the evidence is taken orally, may give liberty to prove them by affidavits. But here, the Plaintiff wants to prove his case by affidavits, after the Defendant has said, "I will have it proved orally." The Plaintiff must specify the particular facts and circumstances which he proposes to prove by affidavits; and I will then dispose of the motion, after asking the Defendant what he has to say to it. It may be of great importance to him to be able to cross-examine the witnesses.

The order to be made under the 37th section will be, that as to particular facts, or a particular set of facts, the Plaintiff shall be at liberty to prove them by affidavits.

It is obvious, that the act does not mean to confine the Defendant's protection to that afforded under the 29th section.

1853.

MOSTYN v. MOSTYN.

SAMUEL MOSTYN of *Calcott Hall*, the brother of the testatrix, had the following five children:—*Robert John Mostyn, John Henry Mostyn, Samuel John Mostyn, Thomas Mostyn* and *Mary M. Davies*.

In this state of the family, the testatrix, in 1824, made her will, whereby she appointed her "nephew, *Robert Mostyn of Calcott Hall*," her executor. She then bequeathed two life annuities of 50*l.*, and a legacy of 50*l.* to *T. L.* and *M. L.*, and proceeded as follows:—"My property in this house to be taken as marked out. My dear nephew *John Henry Mostyn of Holywell*, surgeon, but late of *Calcott Hall, Flintshire, North Wales*, the above bequests to fall into his hands, and should he not marry, to be divided equally between *Samuel Mostyn, John Mostyn* and *Mary M. Davies*, all of them late of *Calcott Hall*, must receive each 50*l.*, the residue to fall into my above-named executor's hands."

Feb. 7, 14.
A testatrix having nephews named *Robert John, John Henry, Samuel* and *Thomas*, appointed "*Robert*" her executor, and after a bequest to "*John Henry*," directed, that if he should not marry, it should be divided between "*Samuel*," "*John*" and *Mary*. *Thomas* claimed under the gift to "*John*;" but held, that he was not entitled, and that *John Henry* was meant. On appeal, however, the Court was divided.

The testatrix died in 1824, and her will was proved by *Robert John Mostyn*, in her will called *Robert Mostyn*. An annuitant having died in 1844, *Thomas Mostyn* filed this claim, insisting that he was intended by the gift to "*John Mostyn*."

The Defendant, *Robert John Mostyn*, insisted, that either he or *John Henry Mostyn* was intended by the gift to "*John Mostyn*."

Mr. *R. Palmer* and Mr. *Boyle*, for the Plaintiff, cited

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and relied on *Dent v. Pepys* (a); *Blundell v. Gladstone* (b); *Beaumont v. Fell* (c); *Ryall v. Hannam* (d); *Newbolt v. Pryce* (e); *Doe d. Le Chevalier v. Huthwaite* (f); *Adams v. Jones* (g); *Doe d. Gord v. Needs* (h); *Butler v. Bushnell* (i); and argued, that it was impossible that *John Henry* could be intended to take under the gift over in default of his own marriage.

Mr. *Shapter*, for the Defendant, *Robert John Mostyn*, was not heard.

The MASTER of the ROLLS was of opinion, that *John Henry Mostyn* was intended by the gift to *John Mostyn*. He observed, that, generally, in the cases relied on, there had been a conflict between the name and the description, between which it was necessary for the court to determine; but that here there was none, for the name and description "*John Mostyn*, late of *Calcott Hall*," sufficiently identified *John Henry Mostyn*. He dismissed the claim without costs.

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| (a) 6 <i>Mad.</i> 350. | (e) 14 <i>Sim.</i> 354. |
| (b) 11 <i>Sim.</i> 467; 1 <i>Phill.</i> 279; | (f) 3 <i>Barn. & Ald.</i> 632. |
| 1 <i>H. Lds. Cas.</i> 778. | (g) 9 <i>Hare</i> , 485. |
| (c) 2 <i>P. Wms.</i> 141. | (h) 2 <i>Mee. & W.</i> 129. |
| (d) 10 <i>Beav.</i> 536. | (i) 3 <i>Myl. & K.</i> 232. |

NOTE.—On appeal, on the 17th of *March*, 1853, the Lords Justices differed, and the decision was therefore affirmed.

1853.

KING v. CHUCK.

July 9, 18.

MEAKIN, *King*, and *Chuck*, for twenty years, carried on business in partnership but no articles of co-partnership had ever been executed between them. However, the accounts being annually made out, a memorandum was added at the foot, that if either of them should die, his capital, as appearing by the last account, should be paid to his representatives by the surviving partners, on whom the trade was then to devolve.

In 1839, *Meakin* died, and his executors established their right to the testator's capital, in conformity with the memorandum.

King and *Chuck* then continued to carry on the business in partnership together, but no articles were executed. The former memorandum was not continued in the annual accounts, but some gross sums, by way of deduction, were made therein, in respect of bad debts.

Some conversation had taken place between *King* and the solicitors of the firm, in consequence of difficulties that had occurred in the settlement with the executors of *Meakin*, in regard to an allowance for bad debts in the account; and in *March*, 1843, a draft was prepared by the solicitors of the firm, on instructions from *King*, which recited the above stated terms, in the former

Surviving partners held, by inference deduced from their conduct, to have carried on their business on the same terms as the original partners.

In a partnership between *A.*, *B.* and *C.*, there was a stipulation, that if one died, the survivor should take the business and pay his executors his capital, as appearing on the last account. *A.* died, and *B.* and *C.* continued to carry on the business without articles. *B.* afterwards died. The Court, from the conduct of the parties, inferred, that *B.* and *C.* carried on their business on the same terms, as to winding-up on the death of either, as those which applied

to the first partnership between *A.*, *B.* and *C.*, and decreed *C.* to pay to *B.*'s executors his capital, as appearing on the last account.

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KING

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former partnership, for a settlement on the death of either, and that *King* and *Chuck*, since the death of *Meakin*, had continued to carry on the business *upon the terms aforesaid*, in the event of the death of either of them, and that they had agreed to vary the terms and conditions of their partnership. It then purported to provide, that in case of the death of a partner, 15*l.* per cent. should be allowed for bad debts from his share of the capital.

The draft was communicated to both parties, but there was no proof of its ever having been approved of or adopted, and it was never engrossed or executed. A correspondence, however, took place between the partners as follows:—*King*, on the 11th of *March*, 1843, wrote to *Chuck*—“I have this post received from Messrs. *Overton* and *Hughes* (the solicitors), a form of partnership to sign, which I think very advisable and proper, had we not already provided for death, by making an allowance for debts, which I suppose amount to 10*l.* per cent.; therefore, I recommend no alteration be made till next stock taking.” In answer, *Chuck*, on the 31st day of *March*, 1843, wrote to *King* as follows,—“With respect to the allowance taken off for bad debts, 'tis done, and must have been a mistake of *Hughes*, as he told me you named 15*l.* per cent., and quoted the opinion of *T. and W. Jones*, but I am not much pleased whatever it was. It was between you and him, unknown to me.” In answer to this, *King*, on the 4th day of *April*, 1843, wrote to *Chuck* as follows,—“I perfectly recollect Mr. *Hughes* and myself having a conversation, in your absence, about our book debts, which brought to my mind what passed at the time *Alexander King* died, that several houses were applied to, to say the fair sum we ought to allow for unexpected bad debts, and *William* and *Thomas Jones* being one,
said

said, (to the best of my recollection,) 10*l.* or 15*l.* per cent., which was never acted on; for the executors discovered, on further examination of the deed of partnership, that everything was provided for, which proved to me the necessity of the same precaution for us to take, which Mr. *Hughes* saw, and considered, from what I said, he had better do it, which I should never have thought of ordering without consulting you, particularly having already made a fair provision. But another time, before we make up our stock book, it may be as well to take the matter in consideration."

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King died in 1849; whereupon his executors insisted on *Chuck's* paying them 10,022*l.*, which appeared to be the amount of *King's* capital in the last balance sheet, and in June, 1851, they instituted this suit to enforce their claim.

The alleged agreement was denied by *Chuck*.

Mr. *R. Palmer* and Mr. *Southgate*, for the Plaintiffs, contended, that the obligation to purchase the deceased Partner's share in the concern, at the amount appearing to his credit at the last annual account, which applied to the partnership of *Meakin*, *King* and *Chuck*, had been continued in the partnership of *King* and *Chuck*, for the business had been carried on, upon the same principle, and in the same manner, as before the death of *Meakin*. They relied on the draft agreement, and the conduct of the partners, as evidence of the terms on which the business had been carried on.

Mr. *Roupell* and Mr. *Moore*, *contrà*. The mode of settlement on the death of a partner was applicable to the original partnership between the three, but was never adopted by the survivors. The draft agreement carries

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carries the case no further. It was a mere proposal, and was never executed or assented to, and, therefore, no final or binding agreement was ever entered into, on the subject of a settlement, on the death of *King* or *Chuck*. The same observations apply to the letters; they proceeded no further than a treaty.

Mr. *R. Palmer*, in reply.

The MASTER of the ROLLS reserved judgment.

July 18.

The MASTER of the ROLLS.

It is clear, that though the draft was prepared by the direction of *King*, it was prepared with the knowledge of both parties. It appears that a proposal was then made by *King*, to put his son in his place; *Chuck* declined it, but he did not add one word, disputing the recital in the draft of the terms on which they carried on the partnership. Three letters afterwards passed between them; one of the 11th of *March*, 1843, from *King* to *Chuck*; *Chuck's* answer on the 31st of *March*, 1843, and *King's* reply on the 4th of *April*. They all proceed on this supposition, that the recitals are correct, and that the new partnership contract contained the same stipulation as the old. They seem, however, to have considered, that these points might be provided for in the annual settlement of accounts, and that the deed was unnecessary. This view is confirmed by this circumstance:—That the new proposed partnership articles did not provide for anything, except this allowance on bad debts to be made to the continuing partner.

In *April*, 1849, *King* died, and after his death, some discussion and correspondence took place, and the bill
was

was afterwards filed by his executors, to enforce the terms of the partnership. It appears to me, that the conduct and correspondence of *Chuck*, after the death of his partner, confirms this part of the case. *Chuck* nowhere treats the concern as liable to be wound up, there is no admission that it ought to be sold and the produce divided between him and the executors of *King*, according to their shares in it. Although, on the death of *King*, one of two things must necessarily have been to be done, namely, either *Chuck* was bound to take the partnership share in the stock in trade and good will, and, at the same time, pay the executors of *King* his capital; or the executors were entitled to have the whole business put an end to and sold. *Chuck* did neither of these, but carried on the business on his own account, notwithstanding the request of the executors of *King* to have the business wound up and their share paid. I am of opinion, from the conduct of the parties, that there was a parol contract between them, that when one died, the continuing partner should take the stock in trade, at the valuation which was found due to him at the last settlement of accounts, making the allowance for bad debts.

It is clear that if the converse had happened, and *Chuck* had predeceased *King*, *King* could not have disputed this proposition.

Decree payment of the 10,022*l.* with interest, and costs.

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—
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BRIGGS v. WILSON.

July 22.

In a case unaffected by Lord *Tenterden's* Act, the words "interest on this note paid up to the 13th day of *May*, 1825," indorsed upon a promissory note in the handwriting of a person who was in the habit of transacting business for both the maker and payee of the note, was held sufficient to take the note out of the operation of the statute.

The maker of the note died in 1829, having charged his real estate with payment of his debts; the payee died in 1851, but, after the death of the former, an arrangement was made, by the trustee of his will, with the payee, that interest should not be payable till the death of the latter. Held, that the remedy was not barred.

THIS was an administration suit, in which the Plaintiff *Briggs* sought to establish against *Wilson*, the executor and trustee of the testator, *Adlard*, a claim on two promissory notes.

The first of the two notes, which was for 500*l.*, was dated the 13th of *May*, 1815, and was given by the testator to his mother, and the second note, for 90*l.* 8*s.*, was dated the 28th *November*, 1826, and was also given by the testator to his mother. In 1815, the testator's mother intermarried with *Thomas Sutton*, and on the 22nd of *November*, 1817, a post-nuptial settlement was executed by Mr. and Mrs. *Sutton*, whereby the promissory note for 500*l.* was settled. There was no evidence that the note had ever been indorsed or delivered to the trustees.

The testator died in *August*, 1829, having by his will directed his executors and trustees to sell and convert his real estates, and out of the monies to arise from the sale, to pay and discharge all such of his debts as might be due and owing by him at his decease, and his personal estate might be insufficient to discharge.

At the testator's decease, his personal estate was very small, and his interest in the real estate was reversionary and expectant on the decease of his mother.

Mrs. *Sutton* (the testator's mother) died in 1851, and the

the Plaintiff, as her administrator, claimed the amount of the two promissory notes.

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There was an indorsement on the first note in these words:—"Interest on this note paid up to the 13th day of *May*, 1825;" which was proved to be in the hand-writing of one *Thomas Cram*, deceased, an intimate friend of the testator, and accustomed to keep his accounts and transact business for him, as well as for his mother. The memorandum was without a date, but the Defendant, the surviving executor and trustee of the will, proved, that it existed when the note was deposited with him by *Mrs. Sutton* in 1825, 1826, or at farthest in 1827; and there was evidence to show, that it must have been made at the request and with the privity of the testator and his mother, or one of them.

There was evidence by the Defendant *Wilson* as to an alleged arrangement after the testator's death, when the notes were presented to him, to defer payment of the notes till the death of *Mrs. Sutton*, when the real estate was to be sold.

Mr. R. Palmer and *Mr. R. W. Moore*, for the Plaintiff. Both the notes were subsisting and in full force at the death of the testator in 1829; for as to the 500*l.* note, the indorsement made by the common agent of the maker and payee, showing that interest was paid up to the 13th *May*, 1825, is sufficient to prevent the operation of the statute up to that time; and though there is no signature or date to the indorsement, yet it must have been made in or after the year 1825, and in or before the year 1827, according to the evidence of *Mr. Wilson*, and, therefore, the case does not come within the provisions of the statute 9 *Geo.* 4, c. 14, s. 3. Before that statute (1828), an indorsement on a note or bill of exchange of a pay-
ment,

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ment, by or on behalf of the party to whom it was made, was deemed sufficient proof that it was made; *Smith v. Battens* (a); *Gale v. Capern* (b). The notes were therefore both in full force at the death of the testator, and the trust in the testator's will, for payment of debts, was sufficient to prevent the operation of the statute afterwards. It may be objected, that this indorsement does not come within the old rule of law, so as to make it sufficient proof of payment, because the trustees of the post-nuptial settlement of 1807, and not Mrs. Sutton, were the persons to whom payment was to be made; but this settlement ceased to be operative after Mr. Sutton's death: besides which, the promissory note was never indorsed or delivered to the trustees, and never became vested in them, but remained in Mrs. Sutton, and now belongs to Mr. Briggs as her administrator.

Mr. Lee and Mr. Cole, for the Defendant. From 1815, when the 500*l.* note purports to be made, till 1826, no account is given of it, except that, in 1817, it was assigned to the trustees of the settlement, and that sometime after the death of the testator, in 1829, a claim is made upon it. It is contended, that the trust for payment of debts, contained in the testator's will, saves the statute. But the time for the application of the statute is between the years 1815 and 1829, and there is nothing during that interval to prevent its operation, except the memorandum indorsed upon it by Cram, who, it is alleged, was the agent of the testator and of Mrs. Sutton. But in the cases in which such an indorsement has been held to be valid, the agency was proved; not so here. A trust for payment of debts prevents the operation of the statute, if it be constituted before the statute has operated, but not after the statute has

(a) 1 Mood. & Rob. 341.

(b) 1 Ad. & Ell. 102.

has run ; *Scott v. Jones* (a). The debt was not called in nor was there any acknowledgment of it, except by an indorsement made by an unauthorized agent, a mere stranger, and the delivery of it to *Wilson* in 1826 or 1827. The note of 1826 was no doubt in force at the death of the testator ; but the question is, whether the statute does not apply to bar it, according to the case of *Scott v. Jones*, for the statute was running, and the trustee had no power to waive it ; *Shewen v. Vanderhorst* (b). The statute, therefore, having taken full effect, before the death of the testator, as to the one note (there being no proof of authority to acknowledge the receipt of interest), and after the testator's death as to the other, the claim cannot be sustained.

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v.
WILSON.

The MASTER of the ROLLS.

I feel some difficulty about this case. As to the first note, I think it would be barred by the statute, but for the indorsement, and, being barred before the testator's death, it would have remained so, notwithstanding the trust. I must however decide this case according to what I understand the law actually to be ; and before the statute 9 *Geo. 4*, c. 14, the indorsement in question would have been sufficient to take the case out of the operation of the statute, and, though that might not have been altogether consistent with principle, yet it was nevertheless the law. The payee of the note produced it to the trustee Mr. *Wilson* in 1826 or 1827, and it is proved by him, that the memorandum was then indorsed upon it ; and it must have been so indorsed in or after the year 1825, for it states, that interest was paid up to the 13th of *May* of that year. Therefore, this note was not barred by the statute before the testator's death, and cannot

(a) 1 *Russ. & Myl.* 255, and 4 *Cl. & F.* 382.

(b) 1 *Russ. & Myl.* 347.

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cannot now be barred by reason of the trust for payment of debts. In *Jones v. Scott* (a) there was a charge only on the personal estate, and therefore it is no authority for a case like this, where there is a charge on the real estate, though the charge is qualified. Nothing appears to have been done from the death of the testator until after the death of Mrs. *Sutton's* husband, and there might be a question whether length of time did not affect the case; but it is alleged, that there was an arrangement that no interest should be paid to the testator during the life of his mother. I shall, therefore, admit the claim for the amount of the note, but with interest only from the death of Mrs. *Sutton*. The other note is clearly a charge upon the real estate.

(a) 1 *Russ. & Myl.* 255, and 4 *Cl. & Fin.* 382.

Re IRBY.

July 23.

A fund producing upwards of 200*l.* a year, belonging to *A. B.*, a person of unsound mind, though not so found by inquisition, was paid into Court under the Trustee Relief Act. A petition to the *Master of the Rolls* for the application of the income towards his maintenance was refused.

THE sums of 4,451*l.* 17*s.* 3*d.* consols, 1,606*l.* reduced, and 795*l.* reduced, and 560*l.* cash, which belonged to Mr. *Irby*, were paid into Court, under the Trustee Relief Act.

Mr. *Irby* was a person of unsound mind, and incapable of managing his affairs, though not so found by inquisition. He presented this petition by his next friend, praying that the income might be paid to certain near relations, for his maintenance and support, so long as he should remain of unsound mind; the income exceeding 200*l.* a year.

Mr. *Karslake*, in support of the petition, relied on *Shelford*

Shelford on Lunacy (a), and the cases there cited, viz. *Price v. Bedford* (b); *Eldridge v. Croucher* (c); *Machin v. Salkeld* (d); *Bird v. Lefevre* (e); *Eyre v. Wake* (f); *Ridgway v. Darwin* (g). He observed, that the Trustee Relief Act provided, that every order made under it should have the same authority and effect, and be enforced in the same manner, as if made in a suit.

1853.

Re
INBT.

The MASTER of the ROLLS.

In *Upfull's Case* (h), it was doubted by Lord *Truro*, how far the act applied to such a case. In the cases cited, the orders were made in causes, and not under the Trustee Relief Act. If I were to make an order under that act, it would have the effect stated, but I do not think it gives me jurisdiction. Here, I observe, the income exceeds 200*l.* a year, and I should in effect be making an order in lunacy, if I were to accede to the prayer of this petition. You may apply to the Lord Chancellor, but I cannot make the order.

(a) Page 435.

(b) *Reg. Lib.* 1784, p. 227.

(c) *Reg. Lib.* May 15, 1782.

(d) 2 *Dick.* 634.

(e) 4 *Bro. C. C.* 100.

(f) 4 *Ves.* 795.

(g) 8 *Ves.* 65 ; *Reg. Lib.*

1802, B, fol. 576.

(h) 3 *Macn. & Gor.* 281.

NOTE.—See *In re Astley*, 2 *C. P. Coop.* (temp. *Cot.*), 207; *Wilkinson v. Letch*, *ibid.* 195; *Ex parte Ridgway*, 5 *Russ.* 152; *Ex parte Farrow*, 1 *Russ. & Myl.* 112; *In re Berry*, 13 *Beav.* 455.

1853.

*Re PUGH.*

July 26.

A married woman having separate estate, directed a solicitor, in writing, to take proceedings for her and her children in certain suits. The suits did not, however, in any way relate to her. She was no party thereto, but her children only were made parties by their next friend. Held, that her separate estate was not liable for the costs.

MR. PUGH, a solicitor, was employed by Mrs. *Piddocke*, in relation to her separate estate, in the course of which he had received money for her. Besides this, in 1852, Mrs. *Piddocke* and her infant children had instructed Mr. *Pugh* to institute a suit respecting property claimed by the children. Mrs. *Piddocke* and her children had also authorized Mr. *Pugh*, in writing, to take the most active measures possible for them in that suit (*Piddocke v. Smith*), and in another suit of *Piddocke v. Boulbee*. Mrs. *Piddocke* was neither interested in or a party to either of these suits, and Mr. *Pugh* accordingly proceeded, in the name of the children alone, by their next friend.

Mrs. *Piddocke* now presented a petition for the usual order, for the taxation of Mr. *Pugh's* bills against her, in respect of the business done in relation to her separate estate, for an account of his receipts, and for delivering over of papers. Mr. *Pugh* insisted, that Mrs. *Piddocke's* separate estate was liable, not only for the proceedings respecting it, but also for the costs of the two suits, conducted, as he said, by her instructions.

Mr. *R. Palmer* and Mr. *Cole*, in support of the petition.

Mr. *Willcock* and Mr. *Terrell*, *contrà*, relied on *Murray v. Barlee* (a), and contended, that the written instructions of Mrs. *Piddocke* made her separate estate liable

(a) 4 Sim. 82; 3 Myl. & K. 209.

liable for the costs of the suits of *Piddocke v. Smith* and *Piddocke v. Boulton*, and that such costs must be included in the taxation.

1853.

Re
PUGH.

The MASTER of the ROLLS.

The opposition is founded on a misconception of the rights and obligations attaching to the separate estate of a married woman. In *Murray v. Barlee*, a married woman, in respect of her separate estate, employed a solicitor to conduct the proceedings, and it was held that her separate estate was made liable. That is no authority for creating a liability for costs in this case. Here, a married woman, whose husband, by reason of mental incapacity, was unable to take any steps, goes to a solicitor and directs him to take proceedings for her children. It is a separate and distinct matter. She was not a party to the cause, and the litigation had no relation to her or her separate estate; it was instituted merely to ascertain the rights of her children. From the situation of her husband, she was the person who naturally communicated with the solicitor, and in one sense employed him, but he knew that he was employed to protect the interests of the children, and that the next friend was liable to him; but neither the mother of the children, nor her separate estate, was liable for costs incurred in this matter, which did not concern her. I make the usual order for taxation.

Mr. Pugh, showing by his own affidavits, that he would have opposed the common order, must pay the costs of this special petition.

1853.



VERSTURME v. GARDINER.

July 26.

Under a power to lend 2,500*l.* of the trust funds to the tenant for life, held, that it was not exhausted by one loan, but that, after repayment, the power might be exercised a second time.

BY the settlement made on the marriage of Captain and Mrs. *Versturme*, certain funds were vested in four trustees, upon the usual trusts, and the settlement contained a proviso to this effect:—That the trustees (*naming them*), “and the survivors and survivor of them, and the executors, administrators and assigns of such survivor, do and shall,” if required in writing, out of the trust monies, from time to time, lend Capt. *Versturme*, “*any sum or sums of money*, not exceeding in the whole the sum of 2,500*l.*, he, upon every such advance, securing the repayment of the said sum or sums” by his bond and a policy. Provided it should be at his option, “at the time of every such loan,” to substitute real security. The trustees were also empowered to sell the trust funds “from time to time,” for the purpose of the loan or loans.

There was a power to invest the trust monies on real estate, and to sell it, and hold the produce upon the same trusts, and with and under “the same powers” as the money so invested.

There was also a power to appoint new trustees; and it was declared, that every new trustee should “have and might exercise the same powers and authorities whatever,” as if he had been originally appointed trustee.

In 1829, the trustees accordingly lent the 2,500*l.*, which was repaid some time afterwards. Capt. *Versturme* now required the present trustees (three of whom
had

had been appointed under the power), to advance him 2,500*l.* under the power, but they declined to comply, being advised that it was doubtful whether the power, having been once acted on, could be again resorted to.

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VERSTURME
v.
GARDINER.

By this bill a declaration was sought, that the power to lend still subsisted, and that the trustees were bound to lend the 2,500*l.*, upon the terms of the settlement.

Mr. G. L. Russell, for the Plaintiffs. The power is not exhausted upon a loan of 2,500*l.*, but may be exercised from time to time, as may be required. The words "every such advance," "sum or sums," "every such loan," "loan or loans," show, that the power might be exercised more than once. [*The Master of the Rolls*. These words would be satisfied by a loan of different sums, from time to time, amounting in the whole to 2,500*l.*; but would not two loans of 2,500*l.* each be a lending of 5,000*l.*, or "exceeding in the whole the sum of 2,500*l.*."] The amount lent at any one time would not exceed the 2,500*l.* Again, the new trustees were to have the same powers as the original, and therefore the power of lending 2,500*l.* to the tenant for life. He cited *Burt v. Ingram* (a).

Mr. W. H. Clarke, for the trustees, contended, that the power was exhausted, having been once exercised to its full extent, and that it could not be exercised a second time; *Cole v. Wade* (b); *Townsend v. Wilson* (c); *Hall v. Dewes* (d); *Newman v. Warner* (e).

Mr. Welch, for other parties.

The

(a) *Levin on Trustees*, p. 307.

(b) 16 *Ves.* 27.

(c) 1 *Barn. & Ald.* 608.

(d) *Jacob*, 189.

(e) 1 *Sim. (N. S.)* 457.

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The MASTER of the ROLLS.

It appears to me that this power does allow the lending more than once, though the terms are ambiguous. The fact of having repaid the former loan, renders it more likely that the Plaintiff will pay it again. If the freeholds were sold, the produce is to be subject to the same powers; and if new trustees are appointed, they are to have the same powers. If, therefore, the first trustees had lent the 2,500*l.*, the new trustees could not have the same powers, unless they had power to lend again. I must declare that the provision for advancing to the Plaintiff is still subsisting, notwithstanding the former loan.

In re MOSS.

July 27.

A client having withdrawn from a litigation, his solicitor agreed to take one-third of his bill in full discharge, if the suit (which was to be carried on for the benefit of another party) failed; and the client agreed to pay the remaining two-thirds, if it succeeded. The Court refused eight years afterwards, when the suit had succeeded, to open the transaction by ordering a taxation of the bill.

THOMAS P. BAINBRIGGE, the Petitioner, claimed to be entitled to some large real estates in *Staffordshire*; and between the years 1829 and 1844, he had entered into very extensive litigation respecting this claim, in which he had employed Mr. *Moss* as his solicitor. *Thomas P. Bainbrigg* became, at length, tired of this litigation, and on the 21st of *July*, 1845, he entered into an agreement with his brother, *William H. Bainbrigg*, to relinquish all his right in his favour, in consideration of *William H. Bainbrigg* undertaking, in the event of the estate being recovered, to pay "all such costs, charges, and expenses," as *Thomas P. Bainbrigg* had incurred, in reference to the estate, "together with interest, after the rate of 5*l.* for each 100*l.* for a year

year, on the principle of *yearly rests*, on such costs, charges, and expenses," up to that time.

1853.


In re
Moss.

From that time, *William H. Bainbrigge* took up the claim and prosecuted the litigation.

In 1845, many applications had been made by *Thomas P. Bainbrigge* to Mr. *Moss*, for his bills of costs ; and some draft bills of costs, summaries and accounts had, in 1845, been sent to a Mr. *Le Hunt*, a professional man and the cousin of *Thomas P. Bainbrigge*, who acted on his behalf. These bills, after deducting some payments, amounted to about 9,377*l.*, and the payments out of pocket, with simple interest, to about 3,700*l.*, or, charging compound interest, to about 4,696*l.*

These drafts, summaries and accounts were, to some extent at least, examined by Mr. *Le Hunt* ; and on the 18th of *November*, 1845, an agreement was entered into between *Thomas P. Bainbrigge*, of the one part, and Mr. *Moss*, of the other, whereby, after reciting the litigation, and that *Thomas P. Bainbrigge* was indebted to Mr. *Moss*, for certain costs, charges, and expenses, and money paid, laid out, and expended, in reference to the said proceedings, which, with interest, on the principle of annual rests, amounted, according to certain accounts delivered to *Thomas P. Bainbrigge*, and investigated and approved by him, to a balance or sum of 9,377*l.* 3*s.* 5*d.*, and reciting that Mr. *Moss*, having great friendship and personal regard for *Thomas P. Bainbrigge*, had consented to accept from *Thomas P. Bainbrigge*, the sum of 3,500*l.*, in discharge of the said sum of 9,377*l.* 3*s.* 5*d.*, subject to the contingency and agreement thereafter contained, Mr. *Moss* thereby agreed with *Thomas P. Bainbrigge* to accept the 3,500*l.*, payable as therein mentioned, in full discharge of the said sum
of

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Moss.

of 9,377l. 3s. 5d. (except the said *Thomas P. Bainbrigge* or *William H. Bainbrigge* should come into possession of the estates), but *Thomas P. Bainbrigge* agreed, that if any such event should take place, he would pay Mr. Moss the balance of the 9,377l. 3s. 5d. (being 5,877l. 3s. 5d.) beyond the future costs, charges and expenses of recovering the estates.

The litigation was resumed and finally succeeded in 1851. The balance of the bills of costs not having been paid by *Thomas P. Bainbrigge*, Mr. Moss recently brought an action against him to recover the balance due under the agreement of the 18th of *November*, 1845.

Thomas P. Bainbrigge now presented a petition, insisting that the agreement had no legal validity to prevent the taxation of the bill of costs, and praying the usual order for the delivery and taxation of the bills, and a stay of the proceedings at law.

Mr. Rolt and Mr. J. V. Prior, in support of the petition, cited *Saunderson v. Glass* (a); *Nokes v. Warton* (b); *Coleman v. Mellersh* (c); *Crossley v. Parker* (d).

The *Solicitor-General* (Sir R. Bethell), Mr. R. Palmer, Mr. James, and Mr. E. Webster, *contra*, were not heard.

The MASTER of the ROLLS.

This is, in fact, an application to set aside an agreement entered into between *Thomas P. Bainbrigge*, and *John Moss*, on the 18th of *November*, 1845.

At

(a) 2 Atk. 297.
(b) 5 Beav. 448.

(c) 2 Macn. & G. 314.
(d) 1 Jac. & W. 460.

At the time when the Petitioner entered into the agreement, he was perfectly well aware, that *Moss* had a claim against him on bills of costs for 9,377*l.*, and that a considerable part of this sum was for costs out of pocket. At this time, Mr. *Moss* might have enforced payment of the amount due on those bills, whenever he thought fit; and it is admitted, that it would have been very inconvenient to the Petitioner to have then paid the amount. On the other hand, the Petitioner might, undoubtedly, have obtained an order to tax the bill; but on the amount being ascertained, he would have been liable to pay it, and would have been subject to the usual compulsory process (which is very summary) to compel payment of it.

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Moss.

In that state of things, Mr. *Thomas P. Bainbrigge* enters into an agreement with Mr. *Moss*, to pay him 3,500*l.*, 1,500*l.* in money, and 2,000*l.* by a bill, which it is agreed shall completely and entirely exonerate Mr. *Thomas P. Bainbrigge* from all future claim in respect of the bills of costs, whatever their amount might be, if the estate should not be recovered. But if the estate should be recovered, then he was to remain liable to Mr. *Moss* for the balance. The Petitioner being well aware that more than 3,500*l.* was due, for more than that was claimed for costs out of pocket, enters into an agreement, by which, on payment of 3,500*l.*, Mr. *Moss*, in case of failure in the litigation, agrees to forego all further claim against him; but, in the event of success, is to be entitled to the balance of that bill. Nothing is said as to interest on balances, far less of compound interest, and it is for a Court of Law, and not for me, to determine, whether Mr. *Moss* could, or could not, claim anything beyond interest from the time when the balance became due, that is, from the time the estate was recovered. The result, however, is, that the Petitioner

1853.

In re
Moss.

tioner gets this great advantage from the agreement:— he is exonerated entirely from all the risks of the contest; and, under no circumstances, will have to pay more than 3,500*l.*, unless the balance, payable to Mr. Moss, should exceed the amount payable by his brother under the agreement between them. In the uncertainty of the case, even if the Petitioner had been carefully advised, by a competent person, on the subject, and had been recommended to enter into that contract and no other, it appears to me, that it was a wise and prudent agreement to have entered into; and that whatever might be its effect, as regarded his brother, the Petitioner himself was gaining a considerable advantage by entering into it. It is true, that after six years litigation, it has been ascertained, by the verdict, that the Petitioner was entitled to recover the estate; and no doubt, if persons could foresee future events, they would enter into very different arrangements from those which they do enter into when their knowledge of future events is altogether uncertain. The result, however, is, that after a lapse of eight years, the Petitioner comes to set aside a contract, when it is totally impossible for the Court to replace the parties in the same situation as they were in at the time when they entered into it. If the contract were not binding on Mr. Bainbriggs, neither was it binding on Mr. Moss; and, I can have no doubt whatever, that if, before that verdict Mr. Moss had turned round and insisted that the agreement was not binding on him, and that he was entitled to enforce payment of the whole bill, the Petitioner would then have strenuously insisted, that it was a perfectly good and valid agreement.

In that state of circumstances, after this lapse of time, and after what I must consider a settlement of the bill, of which the Petitioner has taken the benefit

I am

I am asked, on the ground of the existence of the relation of solicitor and client, to set aside the agreement, when the solicitor may have lost his vouchers, may have parted with the very things, which, eight years ago, would have enabled him to sustain and prove the propriety of his bill.

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Moss.

I go to the full extent of the authorities cited by Mr. *Prior*; but, there is this great distinction between the case of an agreement between a solicitor and client pending a litigation (when a client cannot, without the greatest inconvenience, part with his solicitor, who alone is fully aware of all the circumstances and bearings of his case), and the present, where, although the relation of solicitor and client existed, still the litigation, as regarded *Thomas P. Bainbrige*, was, in fact, at an end, because he had determined to go on no longer, and the only question was, how to liquidate and discharge the costs then already incurred.

Looking at this case in every possible view, and without referring to any question of jurisdiction, I am of opinion, that this is a binding contract between the parties, which the Petitioner cannot set aside; and if it be a binding contract, then it is admitted that the Petitioner cannot tax the bill.

I express no opinion as to the rights between the two brothers, or whether *William H. Bainbrige* may, or may not, have a right, under the third party clause, to ascertain the amount to be charged on his estate, but, I suppose, as they are brothers, they will settle that between themselves.

This petition, in my opinion, wholly fails, and must be dismissed, with costs.

1853.

*In re MOSS (No. 2).*

July 28.

An agreement, pending a litigation, that a solicitor shall be entitled to compound interest on his demand, cannot be supported.

In 1851, *A.* and *B.* agreed to charge their real estates, with the amount of costs due to their solicitor, with annual rests. The solicitor instituted a suit to enforce the lien, and the client presented a petition for taxation. The Court made the usual order for taxation, with a direction to the Master to ascertain the amount due in 1851, but held itself incompetent, on this occasion, to deal with the question of lien.

A SECOND petition was presented, but by *William H. Bainbrigg*. It stated the litigation respecting the *Woodseat* estate, and that *Thomas P. Bainbrigg* was so dispirited with the unsuccessful result of his former litigation, that he was unwilling to involve himself in the costs of further litigation. That an agreement was signed by the Petitioner *William H. Bainbrigg* and his brother *Thomas P. Bainbrigg*, which was as follows:—

“21st day of *July*, 1845.

“In consideration of my brother *Wm. H. Bainbrigg* undertaking, in the event of the *Woodseat* estate being recovered by him, or his receiving any compensation in lieu of the same, beyond his own costs, charges and expenses, to bear and pay all such costs, charges and expenses as I have incurred in reference to the estates of my late uncle *Thos. Bainbrigg*, Esq., deceased, together with interest, after the rate of 5*l.* for each 100*l.* for a year, on the principle of yearly rests on such costs, charges and expenses, up to the present time: I agree to relinquish, release and make over to *Wm. H. Bainbrigg*, &c., all my right and title in and to the said estates, or any of them under any will of the said *Thos. Bainbrigg*, deceased, or as his heir at law.

“*THOMAS P. BAINBRIGGE.*”

“In consideration of the above agreement, I undertake, in the event therein specified, to bear and pay all

such costs, charges, expenses and interest, as therein mentioned.

1853.

"WILLIAM H. BAINBRIGGE."

In re
Moss.

The Petitioner thereupon employed Mr. Moss, as his solicitor, to conduct, in the name of the said *Thomas P. Bainbrige*, the necessary litigation for the recovery of the estates.

Various legal proceedings accordingly took place, and on the 4th of June, 1848, *William H. Bainbrige* signed a document addressed to Mr. Moss, whereby, after stating "that he was indebted to him in a considerable sum of money, on a balance of account on transactions commencing in the year 1838 and down to the present time, and it being inconvenient for him to discharge the same," he wished to declare, that no advantage would be taken of the statute of limitations, &c., and it proceeded thus:—"And that by you allowing me time, I undertake to pay interest on the balances appearing against me, from time to time, upon the principle of annual rests, until paid."

Various proceedings took place in this Court (a), and ultimately an ejectment was directed to be tried and the claimants obtained a verdict. A new trial was however granted, and on the 7th of April, 1851, when it was about to take place, the suit was compromised, by the claimants giving up the estates and receiving 25,000*l*.

After this and on the 30th of May, 1851, *Thomas P. Bainbridge* and *Wm. H. Bainbrige* signed an undertaking to charge their real estates with the payment to Mr. Moss, "of all sums of money, and bills of costs, charges

(a) See *Bainbrige v. Baddeley*, 9 Beav. 538; 10 Beav. 146; 2 Phill. 705; 3 Macn. & G. 413.
35; 12 Beav. 152; 15 Beav.

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charges and expenses owing to him by both or either of them, *with lawful interest on the same, respectively, upon the principle of annual rests.*"

In *August*, 1852, Mr. *Moss* delivered his bills, and in *April*, 1853, he commenced an action against *William H. Bainbrigge*, to recover the amount. He also instituted a suit to enforce his lien on the real estates, and he claimed to be entitled to compound interest.

William H. Bainbrigge thereupon presented the present petition, alleging that it was not intended that he should be charged with compound interest ; that the phrase "upon the principle of annual rests" was not familiar to him and those in his sphere of life ; that he had not understood their meaning, and had considered them to mean, that the principal was to bear interest and to be ascertained at the end of each year, when the rest was to be made.

The petition prayed, that the bills might be taxed, with the usual directions as to staying the action, and that in taking the account between Mr. *Moss* and the Petitioner, the Taxing Master might be directed to allow Mr. *Moss* interest on the following principle only, which the Petitioner was willing to *concede* to Mr. *Moss* (even though he was not strictly entitled thereto), that is to say, simple interest on the balance for cash advances due from the Petitioner to Mr. *Moss*, at the end of each year prior to 1848, and also interest on the bills of costs of Mr. *Moss* from *August*, 1852, when such bills were delivered.

Mr. *Rolt* and Mr. *J. V. Prior*, in support of the petition.

The

The *Solicitor-General* (Sir *R. Bethell*), Mr. *R. Palmer*,
Mr. *W. M. James*, and Mr. *E. Webster*, *contra*.

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In addition to the authorities referred to on the other
 petition(a) the following cases were cited: *Re Whit-*
combe(b), as to the special agreement, and *Raphael v.*
Boehm(c) and *Seton on Decrees*(d), as to annual rests.

The MASTER of the ROLLS.

I think it desirable that I should explain to the parties
 the view which I take of this case, in order that they
 may both understand it, and how I may probably deal
 with the cause when it comes before me, if that should
 ever happen.

In the first place, there can be no question but that
 the exertions of Mr. *Moss*, for a very considerable length
 of time, have been of a most valuable description, and
 that if he had, at any time, given up his employment as
 solicitor, it would probably have been impossible for
 the Petitioner to have recovered the estate. I am also
 of opinion, as I have often expressed, that the strictness
 of the law, with respect to dealings between solicitor
 and client, so far as relates to giving security for costs
 to be subsequently incurred, is often of very great injury
 to the client himself.

Although it may be difficult to overrate the exer-
 tions of Mr. *Moss* in this matter, still I must deal with
 this case strictly, according to law. No doubt, if Mr.
Moss had thought fit to send in his bill yearly, and take
 a bond for the amount at the end of each year, he might,
 in

(a) *Ante*, p. 342.
 (b) 8 *Beav.* 140.

(c) 11 *Ves.* 92.
 (d) *Pages* 45, 152, 248.

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Moss.

in effect, have obtained compound interest from his client. He might undoubtedly have adopted some such course.

I have felt somewhat embarrassed from the peculiar mode in which the petition is framed ; for it asks me to direct the taxation of the bill of costs and that in taxing the account "the taxing master may be directed to allow Mr. *Moss* interest" on the principle therein specified, which the Petitioner is willing to "*concede*," even if Mr. *Moss* is not entitled thereto. Now this Court cannot deal with such a concession. A party may, by consent and arrangement with another party, agree to give him something to which he is not entitled, but the Court cannot deal with the offer of a person to make a concession by way of inducing it to make a particular order, which the other party is not otherwise entitled to. The Court can only deal with cases according to the law.

I am of opinion, that the first letter of the 4th of June, 1848, cannot be enforced against Mr. *William H. Bainbrigge*. It is impossible to refer to the cases which are of familiar occurrence in this Court (*Saunderson v. Glass* (a) is one), without seeing, that while a solicitor is employed in conducting a litigation for a client, and when the injury to the client, by discharging that solicitor and employing another, would be irreparable (as in the present case), an agreement as to the mode in which the future costs are to be calculated and arranged is one which this Court considers a solicitor cannot enforce against a client.

But the agreement of *May*, 1851, appears to me to stand in a different point of view. That was an agree-
ment

(a) 2 *Atkyns*, 296.

ment in respect of a past bill of costs, and to give a lien on the estate for the amount then due.

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It is impossible for me to direct the bill to be taxed and direct that the interest shall be allowed in a particular form which the Petitioner is willing to concede. If I were of opinion, that the letter of the 4th of *June*, 1848, could be enforced against Mr. *Wm. H. Bainbrigge*, I might give some special direction as to the mode of taxation, but I am of opinion I cannot direct any special mode of taxation.

I am also of opinion, that I cannot, upon petition, deal with the agreement of the 30th *May*, 1851, for a suit has been instituted for the purpose of establishing the agreement for a lien on the estate, for what is due on the bills of costs, with compound interest or annual rests. Upon the construction of this agreement, I purposely abstain from expressing any opinion. It is not merely a charge of what is due from *Wm. H. Bainbrigge* (which is the subject of the petition before me), but it is also a charge of what is due from both brothers, and this a charge upon the estate, which may be a perfectly fit and proper agreement to be carried into effect.

It is also clear, that no order that I can make on this petition will stop the prosecution of that suit, to enforce a different lien and respecting a different matter from that which is now before me. It affects both the brothers instead of one only; and although the order I may make may ascertain the amount due on the bill of costs, it cannot affect the suit.

I am of opinion, therefore, that in this case, I must
~~Order~~ all the bills down to the present time to be taxed
in

1853.

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in the usual manner, and I shall direct the taxing master to certify to me what was due on the 30th of *May*, 1851, when this agreement was made, and I shall reserve the costs of this petition and of the costs of the taxation. I express no opinion on the merits of the cause, for at present I have not the means of dealing with the agreement of the 30th of *May*, 1851, even if I had jurisdiction on this petition, because, on this petition, I have no means of giving effect to a lien on the real estates, nor can I affect *Thomas P. Bainbrigge*.

NOTE.—The suit to establish the lien, and a cross suit, were disposed of by the *Master of the Rolls* in *April*, 1854; see *post*.

BANKS v. BANKS.

July 28.

A. B., having a testamentary power over real estate in favour of his children, devised all the real estates, of or to which he was seised or entitled, "or of which he had power to dispose or to appoint by that his will," on trusts for his children and for other uses exceeding his authority. Held, that the will was an execution of the power.

BY an indenture, dated in 1831, freeholds were conveyed by *Edward Banks* and *Dalarnark Banks*, to the use of *Delarnark Banks* for life, and after his decease to such of his children, for such shares, &c. &c. as he, *Delarnark Banks*, by deed or will should appoint, and in default, between them equally in tail, with ultimate remainder to *Delarnark Banks* in fee.

In 1846, *Delarnark Banks*, by his will, devised to trustees, in these terms:—All the real estates, "whatsoever and wheresoever, of or to which I, or any person or persons in trust for me, am or is seised or entitled to, or for an estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder or expectancy, or of which I have power to dispose or to appoint

by

by this my will," upon trust to sell, and hold the produce upon certain trusts for his children, who should attain twenty-one, or die under that age, leaving issue living at their death, and, in default, to his nephews. He gave powers of maintenance and advancement. And until *his* said freehold estates should be sold, he gave the trustees extensive powers to grant leases for twenty-one years, and building and repairing leases.

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v.
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The question, which was adjourned into Court from the Judge's chambers, was, whether the power of appointment had been executed by the will?

Mr. *Lloyd* and Mr. *Greene*. The power has been duly executed, for the testator has referred to his power by appointing all the real estate "of which he had *power* to dispose or to appoint." In *Bailey v. Lloyd (a)*, *Lloyd*, under two instruments, of 1779 and 1780, had power to appoint property amongst his children. By his will in 1822, he, "by virtue of all powers enabling him," devised all *his* real estates, on trust to sell and divide amongst his children, and he made dispositions of the produce not warranted by the power. Sir *John Leach* held, "that this preface manifested a plain intention to pass all estates which he could affect by virtue of any power which was vested in him (*b*).¹" They also cited *Blacket v. Lamb (c)*; *Carver v. Bowles (d)*; *Kampf v. Jones (e)*; *Limbard v. Grote (f)*.

The MASTER of the ROLLS inquired if there was any other

(a) 5 *Russ.* 330.

(b) Page 341.

(c) 14 *Beav.* 482.

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(d) 2 *Russ. & M.* 301.(e) 2 *Keen*, 756.(f) 1 *Myl. & K.* 1.

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other property subject to the testator's power, and it was said that none appeared.

Mr. *R. Palmer* and Mr. *Forster*, *contrà*. The will is not a due execution of the power. The gift to the nephews, who are not objects, and the trusts, which exceed the testator's authority over the property, show that he did not intend to execute the power, but to dispose only of his own property, over which he had the absolute dominion, by means of an appointment.

Mr. *Wickens*, in the same interest.

The MASTER of the ROLLS.

This case is governed by *Bailey v. Lloyd*. There the will, in fact, professed to execute all powers; and where a testator expressly refers to all his powers, and there is no other property which is subject to any power, it seems as strong, almost, as if he had specified the property itself. The testator, in that case, had made many dispositions not authorized by the power, and it was argued, that this showed that he did not intend to execute it, but this was held insufficient to overrule the previous words. Again, in *Bailey v. Lloyd*, the testator had used the expression "my" real estate; and in many cases it has been held, that these words will not pass estates over which the testator had a mere power, for the power of disposing of property is very different from the ownership of it. The absence of that expression makes this a much stronger case in favour of the execution of the power. Declare the power well executed.

1853.

HARDY v. HULL.

AFTER an administration suit had been wound up, the executors received a debt of 403*l*.

The Plaintiffs thereupon instituted this second suit, whereby they claimed the whole of that sum as part of the estate; but at the hearing, they admitted that one-half only belonged to the testator. By the decree, in 1846, the Master was directed to take the account of subsequent receipts; and it was ordered, that the Plaintiffs should pay to the Defendants *so much of their costs of the suit "as had been occasioned by the Plaintiffs setting up a claim to the whole of the said debt."*

By the decree on further directions, made in 1852, it was referred to the Taxing Master to tax the Plaintiffs "their costs of this suit, except so much thereof as had been occasioned by the Plaintiffs setting up a claim to the whole of the debt," and such costs, after deducting the former costs, were to be paid by the Defendants to the Plaintiffs.

The Master taxed the costs on the following principle:—He considered the suit instituted for two objects, and that one had succeeded and the other failed. He then examined the pleadings, briefs and other papers in the suit, and found that nineteen folios thereof related exclusively to the claim of the whole debt, and that the rest related, generally, to both the objects of

July 29.
The Plaintiffs were ordered to pay to the Defendant so much of the costs "as had been occasioned" by one object of the suit, and a decree was made with costs as to the other objects. The Taxing Master considered the suit to be for two objects, and allowed the Plaintiff one-half only of the general costs common to both. Held, that he was right.

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 HARDY
 v.
 HULL.

the suit. He then taxed the whole amount of the Plaintiffs' costs of the suit (except as to the nineteen folios), at 419*l.*, from which he then deducted 126*l.* (being one moiety of the Plaintiffs' costs up to the hearing of the cause in 1846), and 112*l.* (being one moiety of the Defendants' costs of the suit up to the decree of 1846), leaving a balance of 180*l.* to be allowed to the Plaintiffs as their costs of suit.

The Plaintiffs, insisting that the Master had proceeded on an erroneous principle, presented this petition for liberty to except.

Mr. Roupell, and Mr. J. H. Taylor, in support of the petition.

Mr. Lloyd and Mr. Berkeley, *contra*. On the principal point, *Heighington v. Grant* (a), *The Attorney-General v. Lord Carrington* (b), were cited. And as to the form of bringing before the Court objections to the Taxing Master's certificate, 2 *Daniel's Pr.* (c), and *Smith's Hand Book* (d), were cited.

The MASTER of the ROLLS.

I cannot distinguish this case from *Heighington v. Grant*. The Master having ascertained how much of the costs had been occasioned by the suit, exclusive of the matter dismissed with costs, concluded that the rest of the bill was common to both objects, and apportioned it in two, the two being necessarily equal, and he gave the Plaintiffs one-half. The case of *The Attorney-General v. Lord Carrington*

(a) 1 *Beav.* 228.

(b) 6 *Beav.* 454.

(c) Page 1323 (2nd edit.)

(d) Page 445.

v. *Lord Carrington* is more in the Petitioners' favour. There the Master of the Rolls directed that so much of the information as related to one of two objects should be dismissed *without* costs, and that the Attorney-General should have his costs of the other part. The Master made his report, and applied the same principle as that in *Heighington v. Grant*, and gave the Attorney-General only one-half of the general costs common to both objects. Lord *Langdale* thought that the Master had miscarried; for though such is the rule, where a Plaintiff's bill is dismissed *with* costs, as to one object, and he has a decree with costs as to the other, yet he considered that case as an exception. At the end of his judgment he says, "It is supposed that this is no exception to the general rule. The information was dismissed *without*, and not *with* costs as to part, and a decree was made with the costs of the suit." It is clear that Lord *Langdale* affirmed the general rule, and that he thought there was a distinction when no costs were given of that part which failed, and he considered that the decree in that case was an exception. In this case it is not so, for part of the suit was dismissed with costs, and the Plaintiffs get the rest of the costs.

In the *Attorney-General v. Lord Carrington*, Lord *Langdale* stated that he was a little surprised at the certificate in *Heighington v. Grant*, when he acted on it, but he affirmed the principle in *Attorney-General v. Lord Carrington*.

It is obvious that in many cases, where a suit is for two objects, the part which relates exclusively to the one which fails may be very small; for the general statements may be common to both objects, and would be necessary for the case on which the Plaintiff succeeds, but,

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HARDY
v.
HULL.

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HULL.

but, on the other hand, it is nevertheless possible, that if the Plaintiff had confined his demand to that alone to which he was entitled, the Defendant would not have resisted it. The Court is much disposed to accede to the view of Taxing Masters, and to adopt the rules of their office; and in this case I should be destroying the rule if I were to accede to the prayer of this petition. It must therefore be dismissed with costs.

Re ADRIAN BIRCH.

July 29, 30.

After a lapse of twenty-eight years, a consent to marriage, so as to avoid a forfeiture, was, under the circumstances, presumed.

A legacy was given, conditional on a marriage with the consent of trustees. The marriage took place in 1825, and the party

entitled in default never raised any question as to the consent having been given until 1852, after the death of the trustees and of A. B. Held, that every thing was to be presumed in favour of the consent; and though there was no distinct proof of consent, yet it was presumed from the conduct of the trustees subsequent to the marriage.

THE testator devised real estate to two trustees, (*Coulam* and *Sherwood*), for 1000 years, upon trust to raise a sum of 3,000*l.*, and after the death of his daughter, *Martha Hill*, to pay 500*l.* "unto *Mary Hill*, in case she should have been married with the consent and approbation of the said trustees, or trustee, for the time being, but not otherwise." He directed, that in case she should marry without such consent and approbation, the 500*l.* should not be raised, but become merged for the benefit of *John Hill*, to whom he had devised the estate.

The

DATES.

1810. Death of testator.
1826. Marriage.
1841. Death of *Sherwood*.

1845. Death of legatee.
1851. Death of *Coulam*.
1852. Death of *Martha H.*

The testator died in 1810.

1853.

Mary Hill married *George Goodbarne*, on the 12th of *January*, 1826, and she died in 1845.

Re
Birch.

Martha Hill died in 1852, and the legacies then became payable.

The two trustees had, in the meantime, died; *Sherwood* in 1841, *Coulam* in 1851.

John Hill (the owner of the estate) now insisted, that the trustees had never given or expressed their "consent and approbation" to the marriage of *Mary Hill*, previous thereto, and that, therefore, the charge of 500*l.* had never become raisable out of his estate. But he admitted, that the trustees did not "express any disapprobation of the marriage," after the same took effect. There was no express evidence of any consent or approbation having been given.

It appeared, however, that *Goodbarne* had become acquainted with *Mary Hill*, at *Louth*, in 1822. He then commenced his courtship, and visited her mother and step-father, with whom she was residing, as her accepted suitor. Early in 1823, he went to *London*, and obtained a situation, but he continued to correspond with her. In *January*, 1826, he went down into the country, and was married with the full consent and approval of her mother and step-father. The trustees, who resided twenty-four miles off, were not present, but soon afterwards, *Coulam* came over to see them, and, at the instigation of *John Hill*, pressed *Goodbarne* to relinquish the legacy, which he declined to do, but no question was then raised as to the right to it.

Sherwood

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Re
BIRCH.

Sherwood also came over to visit them soon after their marriage, and he expressed himself in terms of kindness, and offered his congratulations and good wishes. No objection had, until very recently, been raised as to the right to the legacy, nor any allegation of the non-consent of the trustees been made, besides which, *John Hill* had even (in ignorance, as he said,) treated the legacy as payable, and, in 1836, had joined *Goodbarne* in raising a sum of 40*l.* on the security of it. He also admitted the right of *Goodbarne* to it in 1852.

Goodbarne stated in his affidavit, that the letters between him and his wife, prior to his marriage, had been destroyed, and that he was unable to depose with certainty as to their contents, but, to the best of his belief, *Mary Hill* had therein informed him of the consent of *Coulam* to the marriage.

Mr. *R. Palmer* and Mr. *W. J. Bovill*, for *John Hill*, now contended, that there was no proof of the consent prior to the marriage, and that a ratification afterwards was insufficient to entitle the legatee to the charge. They cited *Reynish v. Martin* (a); *Clarke v. Parker* (b); *Malcolm v. O'Callaghan* (c); *Long v. Rickett* (d).

Mr. *Nalder*, for the executor of the surviving trustee.

Mr. *Roupell* and Mr. *Rogers* were not heard.

The MASTER of the ROLLS.

I am of opinion, that this is a condition precedent, and that if the consent of the trustees was not given before the marriage, the legacy was forfeited.

I entertain

(a) 3 *Atk.* 331.
(b) 19 *Ves.* 1.

(c) 2 *Mad.* 354.
(d) 2 *Sim. & Stu.* 179.

I entertain, however, no doubt of the right of *Goodbarne* to this legacy. The ground I proceed on is, that after the lapse of twenty-eight years from the marriage, and after the death of the trustees, every thing is to be presumed in favour of the legatee. That is the ground on which I proceed in this case. If this contest had taken place immediately after the marriage had occurred, and the fact before me had been, that *Sherwood* knew nothing about it, and gave his approbation subsequently, I should be of opinion, that the legacy was forfeited.

1853.

Re
BLACK.

The evidence in the case shows, that no objection was made to the marriage, and that the trustees, if applied to, would have made no objection. This is plain from their subsequent conduct. As to *Coulam*, the evidence is very meagre; *Goodbarne* states, from his recollection of the correspondence with his wife prior to the marriage, that he believes that *Coulam* did consent before the marriage, and that his wife told him so; but as to *Sherwood*, there is no evidence. This, however, is certain, that no claim was ever raised by *John Hill*, until after the death of both of the trustees. *Sherwood* died in 1841, fifteen years after the marriage had taken place, and *Coulam* in 1851, twenty-five years after the marriage. If the question had been raised in their lifetime, their testimony as to the matters might have been obtained.

Persons insisting on a forfeiture cannot be permitted to allow a long period of time to elapse without making any claim, and then to insist on a forfeiture, and throw on the persons entitled the burthen of proving that there has been none.

In the case of *Clarke v. Parker* (a), Lord *Eldon* states his

(a) 19 Ves. 24.

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Re
BIRCH.

his opinion, in a similar case of forfeiture, where trustees were all living and could give evidence. He says :—
“There are so many cases, in which the Court has thought itself at liberty to conceive consent to have been given, substantially, though not in terms, that I do not think it right to decide the case without directing inquiries, with a view to bring fully before the Court matter, which is in some degree before it.”

If the trustees were now alive, there ought to be an inquiry, in order to see what account they gave of the matter. Here, where no consent in writing was necessary, and where there was, at least, a subsequent consent, I am asked, in absence of all evidence, and after a lapse of twenty-seven years, to presume, that no prior consent “substantially, though not in terms,” was given. I am, however, of opinion, that I cannot determine that there has been a forfeiture, and I must hold that *Goodbarne* is entitled to the legacy.

NOTE.—See *Harrison v. The Corporation of Southampton*, Lords Justices, June 13, 1853; *De G. Man. & G.*

1853.

WATSON v. MARSHALL.

EDMUND MARSHALL (a porter), and *Matilda Marshall*, intermarried in 1844, but no settlement had ever been made of any property.

Under the will of a testator, who died in 1852, *Matilda Marshall* became entitled to one-eleventh of his residuary estate, which was found to amount to 377*l.* By an order of this Court, made on the 20th of *April*, 1853, on the personal examination and consent of *Matilda Marshall*, the 377*l.* were ordered to be paid to her husband. It then appeared, that in 1835, *Edmund Marshall* had taken the benefit of the Insolvent Act, and his assignee now claimed the 377*l.* *Matilda Marshall* presented this petition, praying that the 377*l.* or a reasonable part might be settled, and that the former order might be varied. By her affidavit she stated, that although the insolvency had been mentioned in her presence, she was ignorant of its effect, or that her property would become liable, and the insolvency had passed from her recollection. She stated her husband was a porter at Messrs. *F.*, but had no regular salary, and his earnings were precarious and for some months in the year he earned nothing. She had one child. The solicitor who acted for her was ignorant of the circumstance of the insolvency having occurred.

July 30.

Upon the consent of a married woman, 377*l.*, to which her husband was entitled in her right, was ordered to be paid to him. He had been insolvent eighteen years previously, and his assignee having claimed the money, the order was rescinded, and the whole fund was ordered to be settled, notwithstanding the opposition of the assignee.

To save expense, the terms of settlement of a small sum were embodied in the order.

Mr. *G. L. Russell*, in support of the petition, argued, that the order ought to be varied, having been made under a mistake as to its effect, and that, under the circumstances,

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cumstances, the whole fund ought to be settled;
Cutler (a); *Re Kincaid (b)*; and see *Scott v. Spashet*

Mr. *Ware*, for the husband.

Mr. *Osborne, contra*. The money having been
 dered to be paid to the husband, he has obtained
 vested interest in it, *Heygate v. Annerley (d)*, to w
 his assignees are now entitled under the order.
 wife is bound by her consent to the order, in
 same way as if she had levied a fine in respect of
 real estate; *May v. Roper (e)*; *Forbes v. Adams*;
Hutchings v. Smith (g). Her consent cannot now
 recalled, in order to defeat the assignee.

Secondly, no more than a moiety ought to be set
 for there has been no desertion and the husband
 maintains his wife. He also referred to *Napier v.*
pier (h); *Dunkley v. Dunkley (i)*; *Carter v. Taggart*

The MASTER of the ROLLS.

I think I must make the order. A consent given
 der these circumstances, is not such as the Court w
 have taken. If the Court had known the facts, it w
 have inquired and fully explained the effect of the
 sent to the married woman. It is not a formal but a
 stantial objection; for it is the duty of the Court to exp
 to a married woman what she gets and loses by
 consent, and the Court is not satisfied unless all the
 cumstances are stated. Here the Court did not k

(a) 14 *Beav.* 220.
 (b) 1 *Drew.* 326.
 (c) 3 *Macn. & Gor.* 599.
 (d) 3 *Bro. C. C.* 361.
 (e) 4 *Sim.* 364.
 (f) 9 *Sim.* 462.

(g) 9 *Sim.* 137.
 (h) 1 *Dru. & War.* 410.
 (i) 2 *De G. M. & G.* 3.
 (k) 5 *De G. & Sm.* 49;
G. M. & G. 286.

the circumstances, and she was not aware of the effect of the insolvency, of which she had been told, but which had occurred eighteen years ago. The whole fund being still under the control of the Court, there is nothing to prevent her having a settlement. Every part of the property of the husband is liable to be taken by his creditors, and I must, therefore, treat him as a person having no property. I am of opinion that I must order the settlement of the whole fund, on payment to the provisional assignee of his costs, charges and expenses.

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The fund being small may, to save expense, be settled by the order.

ABSTRACT OF ORDER.

Pay costs and legacy duty.

Residue to be carried to a separate account. Pay the income to wife, and declare it to be for her separate use, without power of anticipation, and after her decease for her children by any husband, and as she shall appoint; and in default, equally to her sons who shall attain twenty-one, or daughters who shall attain that age or be married, with benefit of survivorship. Maintenance and advancement. In default, to her executors, &c, if she survive her husband, but to her husband, if she shall die in his life.

1853.

The ATTORNEY-GENERAL v. EWELME
HOSPITAL.

April 26, 27.

August 1.

In 1437, an almshouse or hospital was founded and endowed by the lord of the manor of *Ewelme*, for

THE almshouse and hospital of *Ewelme* were founded in the year 1437, by *William de la Pole*, Duke of *Suffolk*, by virtue of a licence granted to him and *Alice* his

thirteen poor men, two priests, for praying for souls and the education of youth, and the right of nominating the master was vested in the lord of the manor for the time being. Previous to 1513, the manor and the rights of patronage became, on the attainder of the lord, forfeited to the Crown. In 1618, King *James the First*, by letters patent, granted the right of nomination of the master to the University of *Oxford*, for the support of the Regius Professor of Medicine, and in 1818, the manor, with all its advantages and endowments, was duly granted by the Crown to *J. B.* The following points were held:—

First, that the rights of nomination and visitation, incidental to the manor, did not, upon the forfeiture by attainder, become merged and extinguished, but vested in the Crown.

Secondly, that the property, &c., of the hospital were not affected by the statutes for the dissolution of monasteries (27 *Hen.* 8, c. 28, and 31 *Hen.* 8, c. 13), but remained vested in the Crown as before.

Thirdly, that they were not, in any degree, affected by the act respecting chantries (1 *Edw.* 6, c. 14), so as to vest the property in the Crown, as its *quasi* "private possessions."

Fourthly, that the founder, by annexing the right of nomination to the manor, could not and had not made them inseparable; but that the right of patronage was in the nature of a lay advowson, which the lord might alien without parting with the manor, and the converse.

Fifthly, that by the grant of King *James* to the University of *Oxford*, the *jus patronatus* had, *de facto*, been severed from the manor of *E.*

Sixthly, that by the common law, the grant of a manor by the King *cum pertinentibus* would pass an advowson appendant to it, and that the statute 17 *Edw.* 2, c. 15, created a restriction as to advowsons of churches only and did not apply to the present case of a lay advowson.

Grants by the Crown are construed favourably to the grantor, and in such a case, the usual rule as to the construction of grants is inverted. If it be shown that the King is deceived in his grant, it will not include a subject matter not expressed.

Unascertained and undefined advantages will pass under the general words by a grant of a manor, although not in the contemplation of either party at the time. Thus, for instance, the minerals in the lord's waste would pass, although their existence was neither known nor suspected by any of the parties to the contract. So also, the advowson to a living will pass with a manor by general words, though not specifically named in the grant.

After a long possession, the Court will make great presumptions, including, in some cases, even an act of parliament, in order to protect a right. The Court will not, however, adopt such presumption, when the origin of the right or possession is clearly ascertained and negatives such presumption.


his wife, by King *Henry* the Sixth. It was built on ground belonging to them and appurtenant to their manor of *Ewelme*; and on the 4th of *February*, 1442, were endowed by them with certain manors in *Bucks*, *Wilts* and *Hants*. It consisted of two priests or chaplains, and thirteen poor men, and various statutes and ordinances were made by the Duke and Duchess of *Suffolk*, for its regulation and government.

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The two priests and the thirteen poor men were, by these statutes, to constitute a body corporate, whose duty it was to pray for the living and the dead; and of the two priests, one was to be preferred in power and reverence, and was to be called the Master of the almshouse, and to have charge of the domestic economy and government of the institution, and the other was to teach grammar to the children of the manor of *Ewelme* (who were to be taught *gratis*), and say mass in the master's absence. The Chancellor of *England* and the treasurer were appointed protectors of the charity, against encroachments of the lords of *Ewelme*; and the Duke's successor in the lordship of *Ewelme*, at the time of his visitation, was empowered to remove the master and teacher of grammar, for reasonable cause, to be inquired into. The lords of the manor of *Ewelme* were also to be provisors of the almshouse, and to have power, from time to time, to provide for the same a master, teacher of grammar and poor men, in case of voidance by death or otherwise; the master to be a learned man of the University of *Oxford*, passed thirty winters of age, with liberty to hold a prebend or free chapel or benefice, so as not to interfere with his duties or residence in the hospital. The charity was to be visited, also, once a year, by the provisors or founders.

In the reign of *Henry* the Eighth, the manor and the lordship

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lordship of *Ewelme*, and all the rights of patronage incidental to it, became vested in the Crown by the attainder of the then lord (whether of the founder or his grandson did not appear), and *Henry* the Eighth and his successors afterwards remained lords of the manor, down to the year 1818. In the year 1618, *James* the First, by letters-patent, and to promote good literature and increase the stipend of the Regius Professor of Medicine in the University of *Oxford*, for the time being, granted to the Chancellor, masters and scholars of the University, the donation, collation and free disposition of the office of warden or master of the almshouse or hospital of *Ewelme*, and directed that the professor, though a layman, and not in holy orders, should enjoy the office and its endowment, so long as he held the professorship. And by the same letters-patent, he granted a prebend to the chancellor, masters and scholars, for the same purpose, and gave his assent to an application to Parliament, for an act to authorize the professor to hold the mastership and prebend for his support.

No act of Parliament appeared to have been passed to vest the mastership and prebend in the chancellor, masters and scholars of the University, or to alter the character from spiritual to lay, but the Regius Professor of Medicine, for the time being, had ever since 1618 held the mastership of the hospital.


In 1818, the Commissioners of Woods and Forests, under the provisions of the statute 57 *Geo.* 3, c. 97, in consideration of 1,507*l.*, granted the honour and manor of *Ewelme* to *Jacob Bosanquet*. The grant contained these parcels:—All that the manor of *Ewelme*, in the county of *Oxon*, and all advantages, emoluments, &c., and every part and parcel thereof, in as full and complete a manner as the King now holds them.”

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On the 24th of *March*, 1821, the manor was conveyed by Mr. *Bosanquet* to the late Earl of *Macclesfield*, from whom it passed to the present Earl, who, in 1824, claimed the rights of patronage attached to the office. After some discussion and delay, Sir *Robert Peel*, the then Home Secretary, wrote to the Earl, on the 14th of *August*, 1826, to inform him, that the law officers of the Crown were of opinion, that the rights in question were so inseparably annexed to the lordship of *Ewelme*, that they must, of necessity, be exercised by the lord of that manor, and that it would not, he thought, become him to advise the Crown any longer to dispute his lordship's title to the exercise of those rights, although the officers of the Crown never contemplated the sale of those rights, nor were they included in the property valued, and the Crown never received any valuable consideration for them."

From that time, the Earl of *Macclesfield* nominated the almsmen, but the office of teacher of grammar, held by the Rev. *George David Faithfull*, had not been vacant since 1824. The office of Regius Professor of Medicine became vacant in 1822, when Dr. *Kidd* was appointed, and no claim was then made on the part of the late Earl. Dr. *Kidd* died in *September*, 1851, and thereupon the Earl of *Macclesfield* appointed the Defendant, the Rev. *Henry Alfred Napier*, to be the principal chaplain and master of the almshouse. On the 15th of *November* following, the Queen appointed Dr. *Ogle* to be Regius Professor of Medicine, in the University of *Oxford*, and the University appointed him master of the hospital. A question thereupon arose, which of these two gentlemen had been rightfully appointed master.

An information was filed by the Attorney-General,
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against the chaplain and poor men of the almshouse of *Ewelme*, the University of *Oxford*, the Earl of *Macclesfield*, the two claimants of the mastership, and the Solicitor-General, praying that proper directions might be given for regulating the charity, and for a declaration as to the discontinuance of fines, and an inquiry as to existing leases; but the main and only question discussed was as to the right of nomination to the mastership.

The *Attorney-General*, Mr. *Roupell*, Mr. *W. M. James*, and Mr. *Terrell*, in support of the information.

The *Solicitor-General* and Mr. *Whitbread*, for the University of *Oxford*, said, the Court had to determine the question between those parties to the suit who were the real litigants, as to the true meaning and effect of the grant to Lord *Macclesfield*; for if it did not expressly include the hospital, or convey it as annexed to the manor, then the right of nomination did not pass by the grant, even though it should be held that the letters-patent of *James* the First did not sever the right of nomination from the manor. But if the grant did carry the hospital, as annexed to the manor, there would still arise the question as to the severance from the manor of the right of nomination, and whether it was competent to King *James* the First to give the mastership a lay character. They cited *The Queen v. The President and Chapter of the Cathedral Church of St. Peter's, Exeter* (a); *Attorney-General v. The Governors of Harrow School* (b).

Mr. *R. Palmer* and Mr. *Wickens*, for Dr. *Ogle*. The Crown, on the attainder of the lord of *Ewelme*, became entitled

(a) 12 *Ad. & Ell.* 512.

(b) 2 *Ves. sen.* 551.

entitled to the manor and to the hospital, as annexed or appendant thereto, and also to the right of visitation of the hospital; and, being so seised, might grant the manor, without the right of presentation, or the latter alone, and so sever it from the manor, in the same way as an advowson (for this was in the nature of an advowson), appendant to a manor, might be severed from it, by grant or otherwise. The right of presentation therefore became properly vested in the University of *Oxford* by the letters-patent of King *James*. As to the conversion of the mastership from a spiritual to a lay office, it was competent for the King, as visitor and lord, by the letters-patent, to make that alteration. The master was required to be a priest in holy orders, merely to qualify him for the duty of saying masses for the living and the dead. But the law having abolished superstitious uses, and the duty of saying masses for the dead having ceased, the qualification of the master being in holy orders became unnecessary. The King, as lord of the manor and visitor of the hospital, had a right, therefore, by his letters-patent, to convert the mastership into a lay office, and he did so convert it. It is to be presumed that he did so legally, and that to that extent the ordinances were legally dispensed with; but, if an act of Parliament were necessary, then it must be now presumed. They cited *Adams v. Lambert* (a); *Philips v. Bury* (b); *Colborn v. Dale* (c); *Attorney-General v. Browne's Hospital* (d); *Dr. Bentley v. Bishop of Ely* (e); *The King v. The Bishop of Ely* (f); *Farcar's Case* (g); *The Mayor of Kingston-upon-Hull v. Horner*;

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(a) 4 Rep. 115; Moore, 648;  
*Duke's Ch. Us* (Bridg. edit.),  
469.

(b) 1 Lord Raym. 5; 2 T. R.  
346; *Show. P. C.* 35.

(c) 4 Rep. 116; *Duke's Ch.*  
*Us.* (Bridg. edit.), 466.

(d) 17 Sim. 137.

(e) *Fitzg.* 309.

(f) 1 W. Black. 52, 71; 1  
*Wils.* 266.

(g) Cited *Skin.* 78; 12 *Vin.*  
*Abr.* 58.


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Mr. *Follett* and Mr. *Osborne* for the Earl of *Macclesfield*. The founders of this charity granted the hospital to the chaplains and poor men, to be held by them in frankalmoign, and its purpose therefore being clearly defined and the services consisting of prayers, masses and obits for the souls of the grantors and their heirs dead and living, the hospital became appendant to the manor, and the right of presentation being attached to the person of the lord of the manor, it was not competent to King *James* to sever the right of appointment from the manor. The whole was intended by the grant to be held together, and there was no power to alien the right of patronage. Being a personal right attached to the lord, to alienate it would be to destroy it. Still less was it competent to the King to convert the tenure by frankalmoign or free alms, as intended by the founders, into a lay tenure. The King, at all events, had no power to dispense with the trusts of a private charitable foundation; and if he had no power to vary the

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|------------------------------------------------|-----------------------------------------------------|
| (a) <i>Cowp.</i> 102.                          | (i) 2 <i>Beav.</i> 151; 5 <i>Myl. &amp; Cr.</i> 11. |
| (b) 1 <i>Eden</i> , 276, 295.                  | (k) 1 <i>Jac. &amp; Walk.</i> 159.                  |
| (c) 2 <i>Ves. jun.</i> 581.                    | (l) Page 56.                                        |
| (d) 1 <i>Jac. &amp; Walk.</i> 51, 63.          | (m) Page 3.                                         |
| (e) 4 <i>Barn. &amp; Cr.</i> 598, 605.         | (n) Page 519.                                       |
| (f) <i>Winch.</i> 37; 10 <i>Vin. Abr.</i> 142. | (o) Page 439.                                       |
| (g) 2 <i>Roll. Abr.</i> 47; <i>Pop.</i> 91.    | (p) Pl. 29, p. 31.                                  |
| (h) <i>Hob.</i> 121.                           | (q) Page 13 a.                                      |

the trusts, neither had the University. King *James* the First, indeed, attempted to alter the trusts of the colleges of the two Universities, but found he could not accomplish his purpose. It is said, that a corporation can surrender their own charter and take a new one; but, however this may be in the case of municipal corporations, the same rule does not apply of private and charitable foundations. They cited *The Attorney-General v. Vivian* (a); *Sir Robert Atkins v. Montague* (b); *Attorney-General v. The Master of Brentwood School* (c); *Co. Litt.* (d); stats. 27 *Hen.* 8, c. 28; 31 *Hen.* 8, c. 13; 37 *Hen.* 8, c. 4; 1 *Edw.* 6, c. 14.

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Mr. *Craig* and Mr. *Hobhouse*, for Mr. *Napier*. The hospital, with the right incident to it, is appendant to the manor and cannot be severed from it, even though the King be lord of the manor, for this is an ecclesiastical benefice in the nature of an advowson, the right of presentation to which is vested in the successive lords of the manor, to be exercised, not for their own advantage, but for the benefit of the charity. Being a personal right in the lord, the charity possesses an inalienable title to have the appointment of master made by the lord. The case is similar to that of a trust created by a person for the benefit of a school, which cannot be dealt with as private property. No alienation, therefore, of the hospital could be made separately from the manor, nor could the Crown and the lord, by concurring together, sever the right of presentation from the hospital. They cited *Re St. John's Hospital* (e); *Porter's Case* (f); *Rennell v. The Bishop of Lincoln* (g);  
*Tyndale*

(a) 1 *Russ.* 226.

(b) 1 *Ch. Ca.* 214.

(c) 1 *Myl. & K.* 390.

(d) Sect. 135, 95 a.

(e) 3 *Macn. & Gor.* 235.

(f) 1 *Rep.* 24.

(g) 7 *Barn. & Cress.* 113.

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*Tyndale v. Warre* (a); *Bishop of Ely v. Bentley* (b);  
*St. John's College, Cambridge, v. Todington* (c); *Ram*  
*on Assets* (d); *Co. Litt.* (e); *Burn's Eccl. Law* (f); stat.  
 23 *Hen.* 8, c. 10; 13 & 14 *Car.* 2, c. 4; 17 *Edw.* 2,  
 c. 8; 34 *Edw.* 3, c. 15; 3 & 4 *Vict.* c. 77.

August 1.      *The MASTER of the ROLLS.*

This cause comes on upon an original and supplemental information filed by the Attorney-General *ex officio*, against the chaplain and poor men of *Ewelme* Alms-house, the University of *Oxford*, the Earl of *Macclesfield*, the Regius Professor of Medicine in the University of *Oxford*, Mr. *Napier*, who claims to be the master of the hospital, and her Majesty's Solicitor-General. The information prays, that proper directions may be given for regulating the charity, and it also prays a declaration, that the system of letting the charity property on fines ought to be discontinued, and for an inquiry to ascertain whether any steps ought to be taken for the purpose of setting aside the existing leases. The question which has been argued before me, relates exclusively to the right of presentation to the mastership of the hospital. There are or may be three claimants of this right of presentation, viz. the Crown, the University of *Oxford*, and the lord of the manor of *Ewelme*. Between the Crown and the University of *Oxford* no contest is raised. Whatever may be the rights of the Crown in this respect before me, they are all waived in favour of the University of *Oxford*, and both concur in contending, that this mastership is attached to the regius professorship

(a) *Jac.* 212, 221.

(b) 2 *Bro. P. C.* (*Toml.* edit.),  
 220; 2 *Stra.* 912.

(c) 1 *Burr.* 158; 5 *Bac. Abr.*

(5th edit.), 604, 605.

(d) Page 199, n. (g), 200.

(e) Page 374 b, 388 a.

(f) Tit. "Colleges."

fessorship of medicine in that University, and in resisting the claim of the Earl of *Macclesfield*, who insists, that the right of such appointment and nomination is vested in him, as the lord of the manor of *Ewelme*. All parties have agreed upon a state of facts, by which they agree to be bound. And these facts, as far as they are material for my view of the case, are thus stated :—

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The almshouse or hospital of *Ewelme* was founded in the year 1437, by *William de la Pole*, Duke of *Suffolk*, who had previously obtained, from *Henry* the Sixth, a licence to found the almshouse, consisting of two chaplains and thirteen poor men. In 1442, the almshouse was endowed with the manors of *Marsh Gibbon* in *Bucks*, of *Cormack* in *Wilts*, and of *Ramsrugge* in *Hants*, and the almshouse or hospital itself was built on certain grounds belonging to the Duke and Duchess, pertaining to their manor of *Ewelme*, and adjoining the churchyard of the church of *Ewelme*. Various statutes and ordinances in writing were established by the Duke and Duchess of *Suffolk*, for the regulation of the hospital, to some of which it is necessary particularly to refer. By the first, two priests and thirteen poor men are established, in perpetuity, who are to pray for the quick and the dead. Of the two priests, one is to be preferred in person and reverence, and is to be called the master of the almshouse. His duties are thus described :—To whose office it shall belong and appertain, the goods of the said house, the which shall come into his hands, well and truly to minister, in such wise that the said goods, any manner dispersed, he shall gather together; and the goods being got and gathered together, he shall, to the profit of the said house, safely keep: and also he shall be busy and do his true diligence, that charity, peace and rest be had and kept among the Brethren, and good example of virtues in his living and speaking he shall virtuously and sadly shew. To the which

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which aforesaid master we will and ordain, that the other priest and all the poor men of the said house, &c., truly obey.

The second priest is to teach grammar to the children of the manor of *Ewelme*, who are to be taught *gratis*, and he is to say mass in the absence of the master.

By the 7th ordinance, the Chancellor of *England* and the treasurer are appointed to be especial protectors of the charity, in case any lord or lady of the lordship of *Ewelme* should require the same.

The ordinances next provide for the manner in which the master shall receive and apply the revenues of the charity. Further ordinances provide for the praying for the souls of deceased persons, and for the services to be performed on such occasions, and for keeping anniversaries and *obits* in the parish church. The 63rd ordinance enables the Duke's successors in the lordship of *Ewelme*, at the time of visitation of the hospital, to remove the master and teacher of grammar for reasonable cause to be inquired into.

The 67th ordinance was in these words:—"We will furthermore and ordain, that after the decease of us both, that person which shall rejoice and obtain our lordship of *Ewelme* next after us, and all others to come which shall succeed to him in the said lordship, for the time which they shall enjoy and occupy the said Lordship, as lords and ladies of the same, shall be provisors of the said house, and shall have power to provide to the same the master, teachers of grammar, minister and poor men in the voidance of any such from the said house by death or any otherwise." The 69th was in these words:—"Also because we devoutly desire, that in all  
times

times to come there should be, in the said house abiding an able and a well disposed master, in body and soul, sadly to counsel and exhort to virtuous living the said poor men, to their comfort and salvation ; therefore, we will and ordain, that after both our decease, in the voidance of any master from the said house, by death or any otherwise, that another learned man of the University of *Oxford*, passed thirty winters of age, if any such may be goodly had, be provided and put into the same house there to serve, receive and live as it is above said. And in case that such a said degreed man may not lightly be had to this purpose, then some other able priest be provided to the same house, to live and receive as it is aforesaid." The 70th was "Also, because the aforesaid office of the master may be more acceptable unto worshipful and well learned men, we will and ordain, that the aforesaid master may have and hold with the said office, a prebend or a free chapel or other benefice, by the which, residence and keeping of the said almshouse be not hurt nor let, so that, by no manner of colour, fraud, nor deceit, the residence in the aforesaid almshouse be lessened or diminished."

The 73rd provides, that after the avoidance of the place of the master or teacher of grammar, by death or otherwise, the vacancy is to be filled as soon as may be.

The 81st, reciting the dread entertained by the founders, that the charity should not be properly maintained, wills and ordains, on their special ordinance, that the house of alms be visited every year once by the provisors and founders of the said house for the time being, if so be that to them it seems needful and expedient. The 83rd ordinance again provides for the correction and exclusion of the master and teacher by the visitor.

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The 84th provides for the supply by the provisor of poor men on vacancies occurring.


By the last ordinance, a power of revision and alteration of the statutes is reserved to the Duke and Duchess during their lives.

It is plain, therefore, on these ordinances, that the right of nomination and appointment of the master of the hospital was vested in the lord of the manor of *Ewelme* for the time being. The manor and lordship of *Ewelme*, and all the rights of patronage incidental to it, became vested in the Crown, whether on the attainder of the founder, or on that of his grandson, is not ascertained, and is not material.

It is the common case of all parties, that in 1513, in the reign of *Henry* the Eighth, the King was the lord of the manor of *Ewelme*, and that his successors have continued so to be down to the year 1818, when the sale took place to which I shall presently advert.

In the year 1618, *James* the First granted by his letters-patent, by which, "for the promoting of good literature and the increase of the stipend and maintenance of the Regius Professors of Medicine in the University of Oxford for the time being," he granted to the University and their successors, "the donation, collation and free disposition to the office of warden or master of the alms-house or hospital of *Ewelme*, in pure and perpetual alms. And the said King willed and declared his pleasure and intention to be, that the said professor, though a layman, and not in holy orders, should have and enjoy the said office, with all lands, &c., so long as he should continue to be such professor, as any other master or warden had held and enjoyed the same."

The King then gave his royal assent, that in the next session of Parliament it should be enacted, "that the said professor for the time being, though a mere layman and not in holy orders, should, for ever thereafter, have and enjoy the said mastership and prebend so long as they should remain in office, or at least all and singular the profits of the same, for their better support in their said offices."

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No such act of Parliament as is referred to in these letters-patent appears to have been passed, at least no record of any such statute is to be found. But the Regius Professor of Medicine in the University of Oxford has, ever since the date of these letters-patent, held the office of master of the said hospital down to the time when this dispute arose. On the 30th *December*, 1818, under the authority of an act passed in the 57th year of his majesty *George* the Third, a grant of the honor of *Ewelme* was duly made by the Commissioners of her Majesty's Woods and Forests, to *Jacob Bosanquet*, in consideration of 1,507*l.*, by these words:—"All that the manor of *Ewelme*, in the county of *Oxford*," with all the usual words employed in the grant of manors, and concluding with these words, "all advantages, emoluments, &c. and every part and parcel thereof." In 1821 this manor was conveyed for valuable consideration by *Bosanquet* to the late Earl of *Macclesfield*, and has since descended to, and is now vested in, the present Earl.

In 1824, the Earl of *Macclesfield* made application to the Secretary of State for the Home Department, claiming to be the visitor of the charity, and to have the right to appoint almsmen to fill the vacancies as they occurred in the hospital. After some delay and discussion, and very reluctantly, as it appears, on the part of Sir *Robert Peel*,

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*Peel*, who was then the Secretary of State for the Home Department, and not till after the Attorney and Solicitor-General had expressed their opinion that the claim of the Earl was just, the claim of the Earl to nominate to these vacancies was admitted, and he has continued, from thence down to the present time, to exercise this right.

The office of teacher of grammar has never become vacant since the purchase of the manor by the Earl. The office of Regius Professor of Medicine became vacant in 1822, when Dr. *Kidd* was appointed, and on that occasion no claim to that appointment was made by the Earl. Since then, the Earl has claimed and expressed his intention to claim, the full rights over the hospital, which could have been exercised by the lord of the manor of *Ewelme*, under the statutes of the Duke of *Suffolk*; and has, on several occasions, met Dr. *Kidd*, and received from him accounts of the revenues and of the affairs of the hospital.

Dr. *Kidd* died on the 17th *September*, 1851, and thereupon, the Earl of *Macclesfield*, by deed of that date, appointed the Reverend *Henry Alfred Napier*, the rector of the parish of *Ewelme*, to be the principal chaplain and master of the almshouse.

On the 15th of *November*, 1851, her Majesty appointed Dr. *Ogle* to be the Regius Professor of Medicine in the University of *Oxford*, and these two gentlemen, each claiming, in the manner I have stated, to be the master of the hospital, have been made Defendants to the cause by supplemental information.

The points which are raised by these facts are numerous

rous and important, and some of them involve the determination of questions of considerable difficulty.

It appears to me to be important, to clear the ground of one or two questions which have been raised, and which are, to some extent, preliminary to the main questions I have to consider.


In the first place, I am of opinion, that on the attainder of the lord of the manor or honor of *Ewelme*, that manor, with these rights of appointment and visitation incidental to it, became forfeited to the Crown, and that these rights did not then become extinguished or merged by escheat, but that the rights were vested in the Crown, and that the right of appointing the almspeople, the master and teacher, and of visiting the charity, vested in the Crown. I think it also too clear for controversy, that the property and benefits to which this hospital was entitled, were not affected by the statutes for the dissolution of monasteries, but that they remained vested in the crown, in the same manner after the passing of that statute, as they were before it. I am further of opinion, that they were not affected, in any degree, by the Act of Chantries. It is needless to go through the authorities on these subjects; the principles of the decisions are quite settled and quite consistent.

I am satisfied that no reasonable case can be made, or arguments adduced, to bring me to the conclusion, that any thing to be found in these statutes can have vested the property of this charity in the Crown, so as to make it analogous to what may be called the private possessions of the Crown, or that they have extinguished the right of nomination to the masterships, which were vested

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vested in the Crown as incidental to and forming part of the rights attached to the forfeited manor.

And on this part of the case, therefore, my opinion is, that these rights have not been extinguished, but that they have remained until the present time, and are now vested in the Crown, unless they have been taken out of the Crown, either by the grant of the letters-patent of *James* the First to the University of *Oxford*, or by the grant of the manor to Mr. *Bosanquet* in 1818.

It becomes necessary, therefore, to consider the effect of these transactions, and the questions which arise upon them. These are, in my opinion, questions of considerable nicety; and although I have taken considerable pains to investigate the subject, and weigh the arguments and authorities which have been presented to me, it is not without diffidence that I state the conclusions to which I have come.

The order in which these points were presented to me was as follows:—

First, it was argued, that assuming the right of presentation to the hospital to have been vested in the Crown, at the date of the grant of the honor and manor of *Ewelme* to Mr. *Bosanquet*, still that this grant did not pass this right of presentation.

Secondly, it was contended, that even if the Court should entertain an opinion adverse to the Crown and the University of *Oxford* on this point, still that a valid gift was made of this right of presentation, by the letters-patent of *James* the First.

And thirdly, that if these letters-patent should not be  
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treated as effectual, for this purpose, nevertheless, that after this lapse of time, this Court would presume an Act of Parliament, or whatever else might be necessary for the purpose of preventing the present possession from being disturbed.

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I shall follow this order in considering these points, and, in doing so, I have first to consider an argument, which, if decided in favour of the Earl of *Macclesfield*, would dispose of the whole question without further discussion, and this is the contention, that the Duke of *Suffolk*, by annexing this right of nomination to the manor, could, and that he, in fact, did, make it inseparable from the manor, so that no subsequent owner could sever the right of presentation to the mastership from the lordship of the manor. On this point, I am of opinion, that the Duke could not so annex it, and that he has not, in fact, so done.

This right of nomination is, in my opinion, exactly analogous to the case of an advowson, if indeed it be not, in the oldest and most extensive meaning of that word, properly an advowson. An advowson, in modern times, and in ordinary language, has no doubt been confined to mean the perpetual right of presentation to a church or an ecclesiastical benefice. Lord *Coke*, however, in his First Institute (a), defines it thus :—"Advowson — *Advocatio*, signifying an advowing or taking into protection, is as much as *jus patronatus*." The patronage or *jus patronatus*, in this case, was not certainly to present to a church or an ecclesiastical benefice, but in every respect, other than that of having the cure of souls attached to the office, it exactly resembles, if it be not identical with, an ecclesiastical benefice. And, accordingly,

(a) Page 17b.

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cordingly, in the thirty-first placitum of the eighth year of the Book of Assizes, the right of nomination to the guardianship of a hospital is called an advowson. There can be no doubt, nor is it in fact denied, that an advowson, in the limited sense of the word, attached to a manor, may be separated from it; that the perpetual right of presentation to a church may be attached to, and may be severed from the lordship of the manor. I am at a loss to conceive any reason or any principle which should apply to the perpetual right of presentation to a church or to a benefice with cure of souls, which renders such a right separable from the manor, which would not apply, with equal or greater force, to a right of nomination to the mastership of a hospital, such as this; nor have I, although I listened with pleasure and attention to a very able argument on behalf of the Earl, been able to collect one argument which the ingenuity of Counsel could suggest for this distinction. No authority was cited, nor, as I believe, can any authority be cited, to establish the proposition, that such a right could not be severed from the lordship.

On this first or preliminary point, therefore, I have come to the conclusion, that the owner of the manor *Ewelme*, in whom was vested this *jus patronatus*, could not have aliened it, without parting with the manor, and that the purchaser would, in that case, have been entitled to exercise this *jus patronatus*, and to appoint to the mastership of the hospital, without let or hindrance from the lord of the manor. If the original proposition be true, the converse of it must also be true; and if the lord could alien the *jus patronatus* without the manor, so also could he alien the manor without parting with the *jus patronatus*.

Whether the Crown, as the lord of the manor, did

or not by the grant, in 1818, to Mr. *Bosanquet*, is the next question I have to consider. Assuming, which I do for the present, that the right of appointment to the mastership was, at the date of this grant, vested in the Crown, *de jure et de facto*, then I am of opinion, that this right passed by that grant.

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I have certainly reluctantly come to this opinion, for the reasons which I am about to state. In the first place, it is quite clear, and, in truth, the contrary has not been asserted at the Bar, that Mr. *Bosanquet* did not intend, or contract to purchase, and that the Commissioners of Woods and Forests, under the authority of the act, did not intend or contract to sell this right of nomination. The particulars of sale are set forth; they contain, with great minuteness, all the possible advantages which were supposed to belong to the possession of this manor. If it had been intended to sell so valuable a right as that of the perpetual nomination of the mastership to the hospital, the value of which amounts to several hundreds *per annum*, and is not united with any cure of souls, and has but few and light duties attached to it, no question can be entertained, in the mind of any reasonable man, but that this fact would have been stated in the particulars of sale, and that the price obtained for the manor would have been proportionally and largely increased; and, although the Earl could, in no case, claim any more than Mr. *Bosanquet*, the same observations apply in equal force to the sale by that gentleman to the late Earl. It is clear, that this right formed no part of the contract, on either side.

It cannot be denied, however, that although this be so, yet that unascertained and undefined advantages will pass by the general words of the grant of a manor,

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although not in the contemplation of either party, at the time. Thus, for instance, the minerals in the lord's waste would pass, although the existence of them was not known or suspected by any one of the parties to the contract; so also, it cannot be disputed, that an advowson, (in the strictest and most limited sense of the word,) which is appendant to a manor, will pass under the general words accompanying a grant of that manor, although it should not be specifically named in the grant.

It is true, that in the cases of grants by the Crown, they are construed favourably for the Crown, and that the usual rule for the construction of grants, as between subjects, is *inverted*, and that if it be shown, that the King is deceived in his grant, the grant will not include the subject matter not expressed. It is, however, perfectly clear, from the authorities, that by the common law, if the King granted a manor, by such words as are contained in the grant made of this manor, that is, "with the appurtenances in as full and ample a manner as he held the same," this would pass an advowson appendant to the manor, although not named or referred to in the grant. This is expressly laid down by Lord Coke, in *Whistler's Case*(a), where he says, "and first it was considered, what the law was before the statute *De Prerogativâ Regis*; and it was agreed, that before that statute, if the King had granted a manor to which an advowson was appendant, without making mention of the advowson, or without saying *cum pertinentibus*, that the advowson should pass," and he cites various authorities in support of that proposition. To remedy this defect, the statute *De Prerogativâ Regis* of 17 *Edw. 2*, c. 15, was passed. That statute declared, that the King's grant of a manor, with the appurtenances,

(a) 10 *Rep.* 63 a.

tenances, should not carry knight's fees, advowsons of churches, or dower, unless expressly mentioned. But the words of the statute are, "*nisi faciat expressam mentionem de advocacionibus ecclesiarum*," &c. It is, therefore, confined to the *advocatio ecclesiæ*; and although I am of opinion that this must be treated as an *advocatio*, and that the common law rights which apply to the one apply to the other (as I have already stated), it is clear, that this statutable restriction is confined to an *advocatio ecclesiæ*, and that the right of presentation in question, although it be an *advocatio*, is not an *advocatio ecclesiæ*; and I am of opinion, therefore, that it is not included within the terms of this statute, and that the provisions of it, therefore, do not prevent the general words of this grant from passing an advowson, not being the advowson of a church, which was, *de jure et de facto*, attached to the manor of *Ewelme*, at the date of the grant in 1818.


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Various authorities concur in strengthening this conclusion. The decision in *Whistler's Case*(a) itself, to which I have already referred. In *Rolle's Abridgment*(b), it is stated, that if the rectory impropriate of *W.*, to which an advowson of a vicarage is appendant, come to the King by escheat, by attainder of *J. S.*, and the King, *ex certâ scientiâ* and *mero motu*, grant to *B.* in fee all the possessions of the glebe and tithes, or the rectory by special and particular names, and generally by *omnia hæreditamenta sua quæcunque*, parcel belonging or appertaining to the said *rectoria de W.*, but no express mention is made of the rectory or of the advowson, &c., as fully and in as ample a manner and form, quality and condition, as the said *J. S.* held them, and as they came to the hands of the King himself, or ought to have come; in this case, by this grant and the said

(a) 10 *Rep.* fol. 63 a.

(b) Vol. 2, p. 185, pl. 1.

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said general words, the advowson of the vicarage shall pass; and by the said words *adeo plene, &c., prout, &c., et ex gratiâ speciali, certâ scientiâ, &c.*, the parsonage shall pass also. I am of opinion, therefore, that this grant, in 1818, was sufficient to pass the right of presentation to the hospital to Mr. *Bosanquet*, and consequently to the Earl, if the same was vested in the Crown at the time of that grant.

The next point to be considered is, whether this right of nomination or advowson of the mastership, was, at the time of the grant, vested in the Crown. It is, I think, established, both by principle and abundant authority, that the grant of a manor *cum pertinentibus* will only carry these things which are appendant to the manor, both *de jure et de facto*; and on this point the question is, whether this right of nomination was attached to the manor, *de jure et de facto*, at the time of the grant in 1818. This involves the consideration of the effect of the transaction which took place in the reign of *James* the First; for, as I have already expressed my opinion that the right of nomination might be severed from the manor, the next question is, whether the grant of the letters-patent, in the reign of *James* the First, did, in truth, sever this right from the manor of *Ewelme*, and if it shall be considered that it did not, whether such acts must be presumed as would be sufficient to create such a severance? And here I think it material, in order that I may be clearly understood, to explain in what sense I understand the words *de jure et de facto*. A meaning must, in my opinion, be given to each of these words, and, consequently, if a severance, which is voidable but not actually void, has taken place before the sale of the manor, the thing severed will not pass by the general words of the grant. Thus, to illustrate my meaning by an example, if the lord of a manor

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to which an advowson is appendant, sell and convey that advowson to *A.*, and then sell and convey the manor with the appurtenances to *B.*, the advowson is separated both *de jure et de facto* from the manor. If, however, the sale of the advowson to *A.* and the conveyance thereof was obtained by fraud, or by any other means which would enable the vendor to set aside or avoid the conveyance, the advowson is *de facto* severed from the manor, although it may not be severed *de jure*; and if, before the conveyance of the advowson is set aside, the lord convey to *B.* the manor, *B.* will, as I understand the principle so enunciated, take the manor without the advowson, and will not be entitled to recover that advowson, although the former lord may have afterwards recovered possession of the advowson from *A.* I have already stated what took place in the reign of *James* the First. It purports to be a grant from the King, for himself and his successors, to the chancellor, master and scholars of the University of *Oxford*, of the donation, collation and free disposition to the office of master or warden of the almshouse or hospital of *Ewelme*, in pure and perpetual alms. I am of opinion that this amounts to a severance *de facto* of this right of nomination from the manor and honor of *Ewelme*.

But in order to guard against a misconception of the extent of my judgment on this matter, it is proper for me to explain how far I think it necessary to decide upon the effect of this instrument. If I am asked to decide, that the letters-patent have conferred an absolute and indefeasible title to the mastership on the *Regius* Professor of Medicine for the University of *Oxford*, or if that be not so, that I ought to presume the passing of an Act of Parliament, or any other circumstance that may be sufficient to establish his title, I am unable to state that I have arrived at these conclusions.

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clusions. The King, by his letters-patent, grants the nomination to the University of *Oxford*, for a purpose there mentioned. If the trusts and duties attached to the mastership could not be severed, except by Act of Parliament, I still think, that in the then state of the law, the Crown had power to grant that nomination to the hospital, as it might have granted the manor; the statute disabling the Crown from making such grant not being then in existence. Nor have I arrived at the conclusion, that, even if the object for which it was granted failed, respecting which I express no opinion, the grant itself was *ipso facto* void and of no effect. I had, I do not think that I could have made the presumption I was called upon to make in favour of the University of *Oxford*, and the Regius Professor of Medicine. Undoubtedly, when a person or corporation is found possessed of and in the enjoyment of a right the origin of which is not ascertained, the Court will protect the possessor in the enjoyment of that right and will presume anything (including, in some cases, even an Act of Parliament) that may be necessary for that purpose; but when the origin of the right is clearly ascertained, and that origin negatives such presumption I am not aware that the Court has ever made such an assumption, nor have I been referred to any case that establishes such a proposition.

If I were of opinion, therefore, that these letters-patent were absolutely void, and of no more value than a mere piece of waste parchment, I should, probably, have come to the conclusion, that the right of nomination to the mastership was not affected thereby, that it still remained in the Crown, *de facto* as well as *de jure*, and I should, in that case, have decided that it passed to Mr. *Bosanquet* and to the Earl of *Macclesfield* with the grant of the manor, as appendant thereto. But  
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have, for the reasons I have stated, come to an opposite conclusion, and without expressing any opinion as to the efficacy of the letters-patent, for the purpose of conferring a perfect title on the University of *Oxford*, or the Regius Professor of Medicine, and without expressing any opinion as to the extinction of the qualification of master, or of the duties attached by the Duke and Duchess of *Suffolk* to the office of master of the hospital, or whether the performance of the duties may or may not be enforceable, at the instance of the Attorney-General, representing the Crown as *parens patriæ* and protecting the public rights, and without expressing any opinion, as to what course the Court in the progress of the suit may think proper to adopt, but purposely leaving all these points open to further consideration, I am of opinion, that so long as these letters-patent remained unrecalled, unrevoked and uncanceled, (and, if at all, they can only be cancelled and revoked at the instance of the Attorney-General, on behalf of the Crown,) they were and are effectual to sever the mastership of the hospital from the manor and lordship of *Ewelme*, and that consequently, at the date of the grant to Mr. *Bosanquet* and the Earl, it formed no portion of and was not appendant or appurtenant to the manor.

My judgment is not founded on the lapse of time, which has occurred. I should have entertained the opinion I have expressed if the letters-patent in question had been granted by the Crown immediately before the grant of the manor to Mr. *Bosanquet*, provided the disabling statutes of Queen *Anne* and King *George* the First had not passed. But it cannot be denied, that the case of the University is much strengthened, and that of the Earl of *Macclesfield* much weakened, by the lapse of time, and the public notoriety of the endowments of the Regius Professorship of Medicine. The letters-patent have

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have remained unrevoked and uncanceled for upwards of 200 years, and they have been acted upon during the whole of that time, down to the year 1851. During the whole of that time, the Regius Professor of Medicine has been the master of the hospital of *Ewelme*, and the manor was, as I have already stated, sold and bought without the suspicion or belief that it had attached to it any such right.

It would, therefore, have been much to be regretted, if, by inadvertence, the Crown had conveyed the endowment of this professorship by the general words of the grant of a manor. In my opinion, it has not done so, and I will make a declaration in accordance with the opinion which I have here expressed. The rest of the decree will be for a scheme according to the minutes, stated to me by Counsel, at the time this case was heard.

*Re* The LIVERPOOL, &c., Railway.

August 1.

The purchase money for settled lands taken by a railway was paid into Court, and after a contract had been entered into for laying it out in land, a petition was presented for its temporary investment in the funds. Held that the proceeding was not vexatious, and that the company ought to pay the costs.

SOME settled land was taken under the powers of a railway act, and the purchase money was paid into Court on the 21st of *November*, 1850.

In 1852, a contract was entered into for the investment of the money in land; after which, on the 3rd of *November*, 1852, a petition was presented for the investment of the purchase money in consols, which was ordered. A reference was made in *April* following as to the title, which having been approved of, a petition was now presented for the completion of the purchase.

Mr. *Kinglake*, in support of the petition.

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Mr. *Bird*, for the company. The petition for investment, after a contract had been entered into, was vexatious, and the Petitioner ought not to be allowed the costs of it.

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*The MASTER of the ROLLS.*

It is every day's experience, that a contract may not be concluded for years after it has been entered into. Allow the costs of both petitions.

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HUTCHINSON *v.* NEWARK.

THIS was a suit for the administration of the estate of *Henry Hutchinson* the younger, who died intestate on the 20th of *November*, 1834, leaving a wife and eight children.

The intestate was a freeman of *London*, and one of the principal questions raised by the suit was, as to the share to which his widow became entitled. She claimed, under the custom of *London*, four-ninths of the estate, and, in addition, the sum of 50*l.* in lieu of her widow's chamber. The children contended, that their mother, having had a provision made for her by settlement on her marriage with the intestate, was thereby, under the custom of *London*, debarred of her customary share of the estate, which they contended became, in consequence of such marriage settlement, divisible into an orphanage moiety and a dead man's moiety, and that the widow was only entitled to one-third of the latter, under the Statute of Distributions, making one-sixth of the whole estate, instead of the four-ninths and the widow's chamber. In

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The widow of a freeman of *London* is barred of her customary part by an antenuptial settlement, whereby the parents of the husband and wife make a provision for her after the death of her husband, of which she takes the benefit. The same rule applies, though the wife be an infant on the marriage and the husband becomes a freeman afterwards.

support

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support of this, they relied on the custom of *London*, as set out from the *Liber de Antiquis Legibus* in the case of *Lewin v. Lewin* (a): "*Quod mulier certâ et specificatâ dote dotata, non potest nec debet amplius habere de catallis viri sui defuncti quàm certam et specificatam dotem sibi assignatam, nisi de voluntate viri sui.*"

The widow insisted, that this custom of *London* did not apply in the present instance, in consequence of the special circumstances, the principal of which were that the intestate was not a freeman of *London* at the time of his marriage, and that the settled funds were no part of his own monies. They also, in the first instance, objected, that the widow was, at the time of her marriage, an infant.

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At the original hearing, inquiries were directed as to those circumstances; and the Master, by his report, found that the intestate was, on the 16th of *January*, 1810, admitted a freeman of the Leather Sellers' Company, by *patrimony*; that the marriage took place on the 12th of *January*, 1820, and that the intestate had not been admitted a freeman of *London* until the 20th of *November*, 1821, when he was admitted by *redemption* in the company of leather-sellers. He found, that the widow, at the time of her marriage with the intestate, was of the age of nineteen, and that previous to the marriage, the settlement referred to in his report had been made.

By this settlement, which was dated the 10th of *January*, 1820, and was made between the husband's father of the first part, the husband of the second part, the wife's father of the third part, the wife of the fourth part

(a) 3 P. Wms. 16.

part, and two trustees of the fifth part, the husband's father gave his son, on the marriage, 1,500*l.* in money, and transferred 1,500*l.* in 5*l.* per cent. stock into the names of the trustees, and the wife's father gave the husband 500*l.* in money and transferred 1,500*l.* in like 5*l.* per cent. stock to the trustees, and he also covenanted to pay the trustees an annuity of 100*l.* during the joint lives of himself and his daughter. The trusts of the settled stock were for the husband for life, with remainder to the wife for life, with remainder to the children equally. In case of failure of issue, one moiety was to go according to the husband's appointment by will, or, in case of his intestacy, to his next of kin; the other moiety was to go according to the wife's appointment by will, or, in case of her intestacy, to her next of kin. The annuity was to be paid to the husband during his life and after his decease to the wife.

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The cause came on for further directions upon the above report. August 4.

Mr. Glasse and Mr. W. D. Evans, for the Plaintiffs, referred to *Lewin v. Lewin (a)*, and to the extract from the *Liber de Ant. Leg.* appended to the report of that case.

The MASTER of the ROLLS considered, that, as this case differed from *Lewin v. Lewin*, he could not decide it without sending to the City Court for a fresh certificate.

He accordingly ordered, that a case be prepared and laid before the Lord Mayor and Aldermen of the city of London, and that they do certify the custom of the said city, by word of mouth of the Recorder of the said city, according to the custom thereof, on the following point:

*videlicet,*

(a) 3 P. Wms. 16.

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—*videlicet*, whether there is any custom of the city of *London*, by virtue whereof, the widow of *Henry Hutchinson*, the intestate, having the benefit of the provisions of her marriage settlement, is, under the circumstances, to be set forth in the said case, debarred from her customary share of the said intestate's personal estate?

The case having been argued by Counsel, in the Court of Aldermen, before the Recorder, on the 28th and 29th of *April*, 1853, the Recorder, on the 10th of *June*, 1853, attended this Court and certified, that there is a custom of *London*, by virtue whereof the widow of the intestate having the benefit of the settlement mentioned in the pleadings, is, under the circumstances set forth in the case, debarred from her customary share of the intestate's personal estate.

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On a subsequent day, the cause came on for hearing, when the certificate was acted upon.

Mr. *Glasse* and Mr. *W. D. Evans*, for the Plaintiff.

Mr. *Roupell* and Mr. *Jessell*, for the widow.

Mr. *Pole*, for other parties.

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## CORMACK v. COPOUS.

June 24.

**T**HE testator, *John Copous*, by his will, dated 6th May, 1816, devised a freehold estate to two trustees and their heirs, upon trust for his son *James Copous* for life, and after his decease, "in trust for all his children lawfully begotten, and his widow, if he leaves one, she to have an annuity of 80*l.* per annum during her life, and at her decease, or if she marries again or cohabits with any man, her annuity is to cease, and to be appropriated to the use and benefit of all the children of my said son, if more than one, share and share alike, and all their children and their heirs for ever; and if but one child, the whole to that one, his or her children and their heirs for ever; but in default of issue of his son, then in trust for his daughter, *Ann E. Copous*, for and during her life, under the same contingencies with regard to the widow of his son, and at the decease of his daughter, then in trust for all her children or child, in the same manner as he had directed with regard to the children or child of his son, and in default of issue of his daughter, then in trust for his two nieces, *Elizabeth*, the wife of *William Trusty*, and *Sarah Nash*, the widow of the late *Thomas Nash*, and their children, subject to the same contingencies with regard to the widow of his son, the mothers and children and each and every of their heirs to share the rents equally amongst

Devise of real estate to *A.* for life, and after his decease, to all his children share and share alike, and all their children and their heirs, but in default of issue of *A.*, to *B.* and *C.* and their children, the mothers and children and their heirs to share the rents equally, as had been directed with regard to the children of *A.* Held, that the gift to *B.* and *C.* was not too remote, and that they and their children living at the death of the testator took as tenants in common in fee.

Bequest of personal estate to *A.* for life, remainder to the children of *A.* equally, and in default of issue of *A.*, upon trust to sell and divide equally amongst *B.* and *C.* and all their children "then" living, share and share alike. Held, that the gift was not too remote, and that *B.* and *C.* and their children living at the death of *A.* alone took the personal estate as tenants in common absolutely.

*B.* died before *A.*, but nevertheless she was held to take a share both in the realty and personalty.

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amongst them for ever, as he had directed with regard to the children of his son and daughter."

The testator also gave 5,000*l.* stock to his trustees, "in trust for his daughter *Ann E. Copous* for life, and at her decease, in trust for her children equally; and his will was, that the trustees should sell so much stock as their several shares should amount to, when they should respectively arrive at the age of twenty-two years, and if any one should die before that age without issue, the survivors to have his or her share equally, but in case of issue lawfully begotten before he or she should arrive at the age of twenty-two years, then the share of such deceased party to go to such issue; and if but one child in trust for that one till he or she attain twenty-two, then the whole of the stock to be transferred to such child, or his or her heirs; and in default of issue of his daughter, then in trust for his son *James Copous*, for life, and after his decease in trust for all his children, like manner as he had directed with regard to the children of his daughter; and in default of issue of his son his will was, that his trustees should sell all the stock and divide the same equally amongst his two nieces, *Elizabeth Trusty* and *Sarah Nash*, and all their children then living, share and share alike."

The testator died in 1817. His daughter *Ann* died in 1832, and his son *James* in 1851; and neither of them ever had issue.

*Sarah Nash* died in 1831; but *Elizabeth Trusty* was still living.

*Elizabeth Trusty* had six, and *Sarah Nash* had four children living at the testator's death, of whom two of them were former

former and two of the latter died prior to the death of the testator's son.

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The cause came on for further directions, when the following questions arose :—

First, whether the gift over of the real and personal estate, or of either, was void for remoteness ?

Secondly, as to the mode and shares in which the nieces and their children were to take the real and personal estate, viz., whether the nieces took estates for life in moieties, with remainder in their respective parent's share to their children, or whether the parents and children took concurrently and equally, as tenants in common ; and if so, then whether children living at the death of the testator, or those living at the death of *James Copous*, only took.

Thirdly, whether the representatives of *Mrs. Nash* took any interest.

*Mr. Temple* and *Mr. Lewin*, for the Plaintiff.

The intention of the testator was, to give the property to his nieces in moieties, and to make each niece a stock, through whom the issue were to enjoy the real estate. This intention clearly appears from his using the words "mother and children." As to the children entitled to take the personal estate, it is clear, that those children only who were living at the death of *James Copous* can take any part of it, because the words "then living" restrict the class to those children.

*Mr. Lloyd* and *Mr. Shapter*. The gift of the personal estate to the nieces and their children is not too remote



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remote, for the words, "in default of issue" of the son or of the daughter, do not mean issue generally, but issue aforesaid, that is, "children;" *Ellicombe v. Gompertz* (a); *Eno v. Eno* (b). The transfer to the children at the age of twenty-two applies to the payment only, and not the vesting of the share itself, which vested at the death of the testator. As to the real estate, the words do not create an estate tail in the son or daughter, for that would be inconsistent with the devise to his or her children "share and share alike." This devise gives merely a life estate to the son and daughter, and an estate tail in remainder; *Baker v. Tucker* (c).

Mr. R. Palmer and Mr. Cotton, for Mrs. Trusty, cited *Turner v. Hudson* (d), to show, that the nieces and such only of their children as were living at the death of James Copous were entitled to take, and that they took *per capita*.

Mr. Teed, for Susanna Price.

Mr. Daniel and Mr. Moore, for the legal personal representative of Mrs. Nash, cited *Burrell v. Baskerville* (e), to show, that the nieces, being named, did not compose a part of a class:—that the words "then living" did not apply to the nieces, but only to their children, and that, therefore, Mrs. Nash took a share. They argued that, by naming them, the nieces took vested interests and became excluded from forming a part of the class.

Mr. Roupell, Mr. Beale, Mr. Webb, Mr. Southgate, Mr. Collins, Mr. Faber, Mr. Goldsmid, for other parties.

Mr. Mr.

(a) 3 Myl. & Cr. 127.

11 Irish Eq. R. 104.

(b) 6 Hare, 171.

(d) 10 Beav. 222.

(c) 3 H. of L. Cas. 106 and

(e) 11 Beav. 525.

Mr. *Campbell* and Mr. *Cracknell*, for the widow and executrix of *James Copous*, contended, that a devise of legal estates was not the subject of equitable jurisdiction; and that as to the real estate, the devise over being after a gift to grandchildren, was either void for remoteness, or gave an estate tail; *Doe d. Todd v. Duesbury (a)*.

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*The MASTER of the ROLLS.*

The first question is, whether the gift to the nieces and their children takes effect, as regards the real or personal estate. My opinion is, that neither of these gifts is too remote. In the first place, I think the words "and all their children and their heirs for ever" apply not only to the annuity, but to the real estate. The gift of the real estate to the children, "and all their children and their heirs for ever," does not appear to me to give any interest to the grandchildren, except through the limitation to their parents. It is not a limitation to the grandchildren, which is to take effect after the death of the children, but the grandchildren must take, if at all, as a class, and concurrently with the children, that is, the children and the grandchildren and their heirs must take together; but that does not appear to me to be the true construction of the clause. If the testator had said, "I devise this estate to all the children and their children for ever," and had stopped there, it would have given an estate tail. The addition of the words "and their heirs for ever" appears to me to show, that the whole of the latter part of the sentence is, in fact, a limitation or a description of the estate which the children are to take. The conclusion I have come to is confirmed by the gift to the two nieces,

*Elizabeth*

(a) 8 *Mec. & Wels.* 514.

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*Elizabeth Trusty and Sarah Nash, and their children* — *en*,  
 "subject to the same contingencies with regard to ~~the~~ *he*  
 mothers and *children*," not naming children of ~~children~~ *children*.  
 If the grandchildren were to take otherwise ~~than~~ *an*  
 through the limitation to their parents, this would ~~not~~ *not*  
 be correct, because the gift would then have been ~~to~~ *to*  
 the nieces and their children, "and all their children ~~a~~ — *nd*  
 their heirs for ever," and not to the children alone.

As to the gift over, "in default of issue," it is scarce ~~ly~~ *ly*  
 contested, that it means in default of that issue ~~whi~~ *which*  
 the testator had before specified, that is, in default of ~~t~~ *the*  
 limitations in favour of those who were to take ~~und~~ *der*  
 those prior limitations.

The cases referred to are valuable and important, ~~b~~ *but*  
 the Court must look at the expressions and context, ~~wi~~ *with*  
 reference to the whole scope and object of the testato ~~or~~ *or*  
 in order to see what he intended. Unless the limitatio ~~ons~~ *ons*  
 and expressions are identical, one man's will cannot ~~c~~ *on-*  
 trol another's.

The result is, that, in my opinion, the gift over ~~of~~ *of*  
 the real estate takes effect in favour of the nieces ~~a~~ *and*  
 their children.

With respect to the personal estate, there is ~~no~~ *no* ~~re~~ *re*  
 doubt, but I think that the principle which applies ~~to~~ *to*  
 the real estate is also applicable to the personal. ~~I~~ *he*  
 testator has given the 5,000*l.* stock to his daugh ~~ter~~ *ter*  
 for her life, and then to her children equally; and ~~in~~ *in*  
 default of issue of his daughter, then in trust for ~~his~~ *his*  
 son *James* for life, and then to his children; and ~~in~~ *in*  
 default of issue of his son, amongst his nieces and ~~the~~ *the* ~~ir~~ *ir*  
 children. The words "in default of issue," both ~~as~~ *as*  
 the daughter and son, refer to a failure of such issue ~~as~~ *as*  
~~re~~ *re*

**are** before mentioned, that is, a failure of the children **of** his son and daughter; and in that event, the nieces **and** their children are to take. I am of opinion, therefore, upon the true construction of this will, that the **gift** over takes effect in favour of the nieces and their **children**, both as regards the real and personal estate.

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**The** next question is, as to the mode in which the **nieces** and their children are to take the real estate. I **think** it impossible to contend, with any show of reason, **that** this devise can be turned into a limitation to the **nieces** for life, with remainder to their children. If it **had** been the intention of the testator to give an estate **to** his two nieces and their children concurrently, as **tenants** in common in fee, I should be at a loss to describe his wishes in clearer and more accurate words **than** this. It is, in truth, a gift to the nieces and their **children**, to share the rents equally amongst them and **their** heirs for ever.

I am of opinion, therefore, that upon the death of the **testator**, the nieces and their children took vested **estates** in the realty, subject to the previous limitations. **The** real estate will accordingly have to be divided into **twelve** shares, of which *Elizabeth Trusty* and her six **children** will take seven, and *Sarah Nash* and her four **children** will take the remaining five. This is the **manner** in which the real estate will be divided.

With respect to the personal estate, the same division **cannot** take place, because the testator uses the words **"then living."** It is clear, therefore, that the children **who** died before the last tenant for life cannot take any **interest** in that property.

The only remaining question is, whether the words  
D D 2 "then

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"then living" are to be applied to Mrs. *Nash*, who died previous to that period, and whether her representatives take a share or not? My impression is, that the grammatical construction of the sentence requires that the words "then living" should be applied only to the children of the two persons named. If a testator were to give a sum of stock to *A.* for life, and after his death to *B.* and *C.*, "and to all their children then living," I should entertain no doubt, but that *B.* and *C.* would take vested interests, and that the words "and all their children then living" referred to the death of *A.*, and meant "all their then children." I was induced to hesitate by the case of *Turner v. Hudson (a)*, but I think that the present case differs from that in this respect, that the nieces are here named. It is not given to the two nieces and their children as a class, but they themselves are specifically named. That distinction is confirmed by the case cited of *Burrell v. Baskerfield (b)*, where the Master of the Rolls seems to have held, that where persons were named, even inferentially, they could not strictly be treated as part of a class. It is only by treating them all as one class, that the words "the living" could be extended to the nieces who are named in the gift.

The class, therefore, appears to me to be confined to the children then living, and the two specified persons who are added to the class. I am of opinion, therefore, that Mrs. *Nash's* share has not failed by her death in the lifetime of the tenant for life, but that her legal personal representative is entitled to one-eighth share of the 5,000*l.* I am prepared to make a declaration to that effect.

(a) 10 *Beav.* 222.(b) 11 *Beav.* 525.

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## SINCLAIR v. JACKSON.

**T**HOMAS RADBOURNE was entitled to the reversion in fee of some real estate, in the event of *M. H.* (the tenant for life) dying without leaving issue. On the 27th of June, 1834, he conveyed his interest to *John Harpur* by way of mortgage to secure 420*l.* and interest, and he thereby for himself, his heirs, &c., covenanted to pay the principal sum and interest.

In 1838, he executed a further charge.

On the fourth of November, 1842, *Radbourne* died intestate, leaving *Mary Elizabeth Wragg* and *Sarah Radbourne* his co-heiresses at law.

In 1848, *M. H.*, the tenant for life, died without leaving issue, and the reversion in fee then fell into possession. In the following year, 1849, *Harpur* transferred his mortgage securities to the Plaintiff *Sinclair*, in consideration of 891*l.*, the principal and interest alleged to be then due. It was attempted to make out, that the co-heiresses of the mortgagor concurred in the transfer, but this was not established.

In 1850, the Plaintiff filed his bill of foreclosure against the co-heiresses of the mortgagor and others, insisting

on the mortgage. Under the Statutes of Limitation, twenty years' arrears could be recovered on the covenant, but six only as against the land. The Master refused to allow the Plaintiff to tack his two claims. Held, on exceptions, that he was right. Whether the right to tack in such a case would be different in a suit for foreclosure, what it is in a suit for redemption, *quære?*

June 1, 2, 3.

A mortgagee, notwithstanding the interest mortgaged is reversionary, can only recover six years' arrears of interest as against the land mortgaged, although he may recover twenty years' arrears on the covenant to pay.

The interest on money secured by mortgage of land and by covenant being sixteen years in arrear, the mortgagee filed his bill of foreclosure against the heir of the mortgagor, raising no question of liability on the covenant or of any right of tacking. A decree was made to take an account of what was due

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insisting that the transfer in 1849 amounted to a mortgage for 891*l.*, so as to convert the arrears of interest into capital, and praying an account on that footing. The Plaintiff omitted to set out the covenant pay contained in the mortgages, and the bill was not framed as to seek relief in respect of such covenants.

On the 15th of *November*, 1851, a decree was made directing the Master to take an account of what was due to the Plaintiff for principal and interest on mortgage securities, and to sell the property, and further directions were reserved. On the 15th of *January* 1853, the Master made his report, finding that Plaintiff was only entitled to six years' arrears of interest prior to the filing of the bill.

The Plaintiff took exceptions, and the principal question was, whether the Master ought not to have allowed the whole arrear of interest from the date of the mortgage in 1834? This point was argued on the following statutes.

By the 3 & 4 *Will.* 4, c. 27, s. 42, no arrear of interest in respect of any sum charged on any land, shall be recovered by any "action or suit," but within six years after it shall become due.

But by the 3 & 4 *Will.* 4, c. 42, s. 3, the remedy by action of covenant upon specialty is limited to twenty years after the cause of such action.

Mr. *Roupell* and Mr. *Baggallay*, for the Plaintiff.

On the death of *Thomas Radbourne*, in 1842, 52 and a large arrear of interest was due to *Harper*, who might have sued *Radbourne* on his covenant, and he recovered the whole arrears of interest, notwithstanding

the statute 3 & 4 *Will.* 4, c. 27, s. 42, which leaves the personal liability on the covenant open for twenty years, under the statute 3 & 4 *Will.* 4, c. 42, s. 3. *Elvy v. Norwood* (a), which was a suit by the heir of the mortgagor to redeem; and it was held, that the mortgagee might tack the personal liability on the covenant to pay the mortgage money, as against the heir, although he could not have done so as against the mortgagor himself. This is a foreclosure suit by the assignee of a mortgagee against the co-heiresses of the mortgagor; and if they could not redeem, except on payment of the whole arrears of interest due on the covenant, they ought not, in this suit, to be in a better position than the mortgagor under whom they claim, and he was liable upon his covenant for the whole amount of the arrears. The mortgagee has, under the covenant, a legal remedy against the heir of the mortgagor, for twenty years arrears of interest; and in equity, to avoid circuity of action, he has a clear right to tack the personal liability to his equitable claim. *Hodges v. The Croydon Canal Company* (b), in which it was decided, that the remedy for arrears of interest extends back only six years, does not apply, because the suit in that case was not for foreclosure, but to enforce payment of a debt out of the produce of the sale of certain shares on which it was charged, and there was no covenant to pay. But it may be urged, that in *Dearman v. Wyche* (c) it is held, that a suit for foreclosure is really and substantially a suit for the recovery of money charged on land, under the 3 & 4 *Will.* 4, c. 27, s. 42; but the other statute of the 3 & 4 *Will.* 4, c. 42, does not seem to have been there referred to, and probably there was no covenant to pay in that case, for nothing of the sort seems to have been alluded to.

Again,

(a) 5 *De G. & Sm.* 240. (b) 3 *Beav.* 86. (c) 9 *Sim.* 570.

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Again, the principal money and interest did not become effectually charged on the land until the contingent reversion fell into possession, and, therefore, the right to receive the interest out of the land did not actually accrue until the estate came into possession; for although an action might have been brought upon the covenant, still the mortgagee could not, by any process whatever, have obtained payment out of the estate, until the death of the tenant for life without leaving issue, which did not happen until 1848. It may, therefore, be fairly said, that the charge upon the contingent reversion could not be made effective until the decease of *M. H.* without leaving issue, when, for the first time, the right as against the lands accrued.

Here the estate has been sold, and the money belongs to the heirs, subject both to the arrears recoverable on the mortgage and on the covenant; it would therefore be contrary to equity to allow the heirs to redeem, except on payment of every thing constituting a charge on the estate and its produce.

It is submitted, that the statute does not apply to this case, and that there ought to be a reference back to the Master to review his report.

They cited *Hunter v. Nockolds* (a); *Du Vigier v. Lee* (b); *Henry v. Smith* (c); *Harrison v. Diugnan* (d); *Hughes v. Kelly* (e); *Wrixon v. Vize* (f).

Mr.

(a) 1 *H. & Tw.* 644; 1 *Macn. & Gor.* 640.

(b) 2 *Hare*, 326.

(c) 2 *Dr. & War.* 381.

(d) 2 *Dr. & War.* 295.

(e) 3 *Dr. & War.* 482.

(f) 3 *Dr. & War.* 104, affirm-  
 ing 2 *Dr. & War.* 192.

Mr. *Lloyd* and Mr. *Metcalf*, for the co-heiresses of the mortgagor. The covenant is not stated or referred to in the bill, and the prayer does not base the Plaintiff's title to relief upon any such a ground. He ought to have alleged a case for relief on that footing, if he intended to rely on a right to tack, for a mortgagee, asking for a foreclosure, is bound to state his claims fully and with precision, although it may not be so necessary in a suit for redemption, where the mortgagor must offer to do equity and satisfy all the mortgagee's claims. If the Plaintiff be held entitled to tack in a foreclosure suit, the act will be evaded which prohibits the recovery of more than six years arrears of interest by "any action or suit." Besides, a suit to foreclose is essentially a suit to recover the money, but a suit to redeem is not; *Hughes v. Kelly* (a); *Elvy v. Norwood* (b). Again, the right to tack would prejudice the rights of the other specialty creditors of the mortgagor who are not parties to the suit.

Mr. *H. C. Jones*, for the representatives of *Harper*.

Mr. *Roupell*, in reply. It is undoubtedly true, that the covenant to pay has not been referred to either in the bill or in the decree, but it was unnecessary to do so, for the question of the amount due for interest could not properly be raised until the matter came before the Master, on his taking the account. The principle upon which it is asked to tack this sum is not as a charge upon the land, but as a liability which must be satisfied, before the Court will allow the Defendants to redeem or take the legal estate from the Plaintiff. The case of *Hunter v. Nockolds* (c) is different from this; for that was a case between two incumbrancers.

*The*

(a) 3 Dr. & War. 482.  
(b) 5 De G. & Sm. 240.

(c) 1 Macn. & Gor. 640; 1  
H. & Tw. 644.

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The evidence does not establish that the transaction of 1849 amounted to a contract, on the part of the Defendants, to treat the arrears of interest as a charge on the land. It was a mere transfer to the Plaintiff of the right of the original mortgagee.

As to the Statute of Limitations, I should be deciding against all the authorities, if I did not hold that a foreclosure suit is within it; for though it is in form a suit to exclude an equity, it is really a suit to recover either land or money. The mortgagee has a legal right to recover the land, but this Court interferes and prevents him from doing so, upon the mortgagor paying the money charged upon it. It is, therefore, in fact, a suit to recover money; and so it is laid down in *Dearman v. Wyche* (a); *Du Vigier v. Lee* (b), and other cases.

The circumstance that, in this case, the mortgaged premises consisted of a reversionary interest, makes no difference. It is a mortgage of an interest in land, and it is a common thing to mortgage a contingency or even a mere possibility; in such a case, the mortgage may be foreclosed before the contingency happens, and such a mortgage is therefore subject to the same rules of law as any other.

June 3.

*The MASTER of the ROLLS.*

Various questions of importance have been argued in this case, but there is no great difficulty in coming to a proper conclusion. It comes before me on exceptions to

(a) 9 Sim. 570.

(b) 2 Harr, 326.

to the Master's report, and the only question is, whether he has arrived at a right conclusion, as to the mode of taking the accounts under the decree. This decree is not a simple foreclosure decree, for it directs the accounts to be taken without prejudice to any questions between the parties, and reserves further directions. The suit was framed with a view to make out a special agreement in *July*, 1849, whereby the Plaintiff became a mortgagee for 891l., for principal and interest, then due to the former mortgagee, *John Harpur*, who was paid off. If the Court had thought that the evidence established this agreement, it would and ought to have made a decree on the footing of that agreement, but it did not and could not, on the evidence, come to any such conclusion, and therefore it only directed, that an account should be taken of the principal and interest due upon the mortgage securities.

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Another question is now raised for the first time, but which, being inconsistent with the claims made by the bill, the Court is unable to deal with, as it ought to have been raised by the bill, by way of alternative relief, in case the claim on the footing of the agreement failed. The point now sought to be made out is, that the original mortgagor being liable, on covenant, to pay the mortgage debt and interest, unrestricted by the 3 & 4 *Will.* 4, c. 42, to the recovery of six years' interest, the mortgagee is entitled to tack what could be recovered on the covenant to what is due on the mortgage securities, as restricted by the Statute of Limitations. This question was not raised by the pleadings, and the Court cannot now decide, that the mortgagee is entitled to tack as against the mortgagor's heir, unless the question had been so raised. But whether raised or not, it is clear, that the Court has not directed that point to be considered by the Master, but has only

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only made the usual decree for an account of what is due on the mortgage securities. I have already expressed an opinion, that the question is the same in a suit to redeem as in a suit to foreclose, that is, the amount charged on the land is the same, but different equities may undoubtedly arise as connected with the one form of suit from those which may arise in the other. A suit to foreclose is a suit to recover money within the stat. 3 & 4 Will. 4, c. 27, s. 42, which enacts, that no arrears of interest shall be recoverable but within six years. Now, strictly, a suit to foreclose is not a suit to recover money, but to exclude a right given to the mortgagor by the rules of the Court. But the statute does not say that no arrears shall be recovered in such a suit, but in *any* suit whatever, the words being, not "an action or suit for the recovery of such interest," but "*any* action or suit." And if the mortgagor pays off principal and interest, and the mortgagee receives twenty years' arrears of interest, and not merely six years, in or by means of a foreclosure suit, it is clear, that the case comes within the 42nd section of the statute; and so it is laid down in *Hunter v. Nockolds* (a); *Hughes v. Kelly* (b). As to that, then, there can be no question; but this does not determine that a mortgagee cannot tack another debt due from the same party upon another security, either in the same or in any other transaction; nor does it decide any such thing.

There is this difference between a suit for foreclosure and one for redemption: — in the former, the mortgagee seeks to recover what is charged upon the land, or to foreclose the mortgagor; but that is a  
 very

(a) 1 Macn. & G. 640; 1 H. Conn. & Laws, 223; 5 Ir. Eq. & Tw. 644. R. 286.  
 (b) 3 Dr. & War. 482; 2

very different thing from the mortgagor seeking to redeem and to restrain the mortgagee from enforcing his legal rights, when the Court may impose upon him this condition, and decline to interfere in his favour, except upon payment of everything which is due to the mortgagee. The whole distinction is clearly expressed in *Elvy v. Norwood* (a). If the suit had been framed so as to raise the point at the hearing of the cause, I do not decide whether or not the mortgagee might have tacked the arrears of interest against the heirs of the mortgagor; but I do not think it makes any difference, whether the debt, which the Plaintiff claims, is secured by a covenant in the same or some other deed; in either case it is on a distinct security, and may be tacked. This was expressly decided by Vice-Chancellor *Parker*, in *Elvy v. Norwood* (a), in a suit for redemption.

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But that is not the point in this case; it is whether the Master, under the direction in the decree, could properly have come to any other conclusion than that to which he has arrived, that only six years' arrears of interest are to be allowed, and I am of opinion that he could not; but I have made the observations on the other points, because of the reservation of all questions for further directions. The exceptions must be overruled.

(a) 5 De G. & Sm. 240.

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## FORSTER v. M'KENZIE.

## FORSTER v. MENZIES.

June 13, 21.

A creditors' suit was instituted in 1803, and in 1806 the usual decree was made, and a sum was paid into Court. The suit became defective in 1807, by the death of the personal representative of the debtor, and the decree was not prosecuted. In 1853, the representatives of the Plaintiff (having revived the suit against the administrator *de bonis non* of the debtor), petitioned for payment of his debt out of the money in Court. The Court gave leave to prosecute the decree as to the debts.

ON the 21st of May, 1803, James Forster and John Forster instituted this suit, on behalf of themselves and all other creditors of Charles King, the elder, against Mrs. Menzies, the administratrix, and against the heir of the debtor, praying the usual decree in a creditors' suit.

The administratrix having admitted 170*l.* 3*s.* 5*d.* to be in her hands, it was ordered to be paid into Court. It was accordingly paid in and invested in 298*l.* 10*s.* 10*d.* 3*l.* per cent. Bank Annuities.

The usual decree was made in 1806, but in 1807 Mrs. Menzies, the administratrix, died, and the prosecution of the decree was abandoned, and no report was ever made. In July, 1814, a considerable part of the Plaintiff's debts was paid by the heir of the intestate, but no further steps were taken in the suit. In 1852, administration *de bonis non* was taken out to the intestate, and in February, 1853, the representatives of the Plaintiff having revived the suit against the administratrix *de bonis non* of the debtor, and the executrix of the heir, presented a petition, submitting, that the claims of the creditors of the intestate, other than that of the Plaintiff, must be taken to be abandoned, or satisfied or barred by time, and praying, that the sum of 298*l.* 10*s.* 10*d.*, 3*l.* per cent. Bank Annuities, and 422*l.* 14*s.* 5*d.* cash, now in Court (being together less than the balance of their debt), might be paid to the Petitioners.

Mr. J.

Mr. *R. Palmer* and Mr. *A. Smith*, on behalf of the **P**etitioners. All debts must be presumed to have been **s**atisfied, or if not, they must be barred by time and the operation of the stat. 3 & 4 *Will.* 4, c. 27. If the decree saved the statute, it was, at the utmost, **e**quivalent merely to a judgment, and its effect would be, **n**ot to give a creditor an unlimited time for establishing his debt, but merely as an acknowledgment of the **d**ebt, to make the statute begin to run from the date of the decree; *Berrington v. Evans* (a). Even if **e**xecutors refuse to take advantage of the statute before the **M**aster, any party interested in the fund may do so; *Shewin v. Vandervorst* (b). They relied on a MS. case of *Beckford v. Jasper*.\*

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Mr. *Walford*, for legal personal representatives of the **h**eir-at-law, who was also one of the next of kin, **o**bjected to the petition altogether. He argued, that a bill **f**iled by one creditor, on behalf of himself and all other **c**reditors, would prevent the statute from running against any

(a) 1 Y. &amp; Coll. (Exch.) 434.

(b) 2 Russ. &amp; Myl. 75.

\* **N**OTE.—In that case, *Beckford*, the representative of *Pope*, filed a bill in 1748 against *Jasper* for an account. *Jasper* died, and in 1753, a decree was made referring it to the Master to take an account of all **d**ealings and transactions between *Pope* and *Jasper*; and, if *Jasper's* representatives should not admit assets, to take an account of his **e**state. In 1760, before the accounts had been completed, 630*l.* **b**ank stock, part of the estate of *Jasper* (who had died), was paid into **C**ourt. In 1764, by a separate report, 9,511*l.* was found due to the **e**state of *Jasper*. A further sum was paid into Court in 1772, but no **g**eneral report had been made nor any further proceedings taken in the **c**ause.

All the parties had died, but in 1851, administration was taken out to *Pope* and *Jasper* and the cause was revived; and upon a petition, presented by the representatives of *Pope*, Vice-Chancellor *Knight Bruce*, on the 26th of July, 1851, referred it to the Master to inquire who was "legally entitled to, and who were beneficially entitled to or interested in," the accumulated fund in Court.

The Master having ascertained such persons, an order was made, on the 3rd of July, 1852, for payment of costs, and the division of the **f**und between them.

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any creditor who comes in under the decree; *Sterndale v. Hankinson* (a); and that the Court would not, from length of time, presume a judgment to be satisfied; *Kemys v. Ruscomb* (b). That forty-seven years had been suffered to elapse since the decree, and that nothing having been done upon it, in the lifetime of the Plaintiffs, who were long since dead, the Petitioner had no right, after such a lapse of time, to revive the suit; *Mitford on Pleading* (c). He was bound to come within twenty years after the abatement; *Sugden's Real Property Statutes* (d).

Mr. *Faber*, for the other Defendants.

*The MASTER of the ROLLS.*

Strictly, this is not the case of a final judgment, no report having been made; but there is a pending suit, and there is a fund in Court, which is held for the benefit of the persons entitled. I have much doubt, whether a petition is the proper course of proceeding, but I will consider the case.

June 21.

*The MASTER of the ROLLS.*

I have considered this case, and have read *Beckford v. Jasper*, which was cited; and I am of opinion, that an order must be made, to enable the Petitioner to carry on the decree in the original cause, in the qualified mode proposed. Here, the decree was made in 1806, and no proceedings,

(a) 1 *Sim.* 393.

(b) 2 *Atk.* 45.

(c) Page 290.

(d) Page 119.

proceedings have since been taken in the suit. This is an application that legal personal representatives of the Plaintiffs, who have revived the suit, may carry on the proceedings. I have had considerable doubts as to the form, but considering what was done in the case cited, of *Beckford v. Jasper*, to be a sufficient precedent, I shall make the order, giving the Plaintiffs liberty to prosecute the decree, as to the debts, in the absence of *Alexander M'Kenzie* and *Sarah* his wife, and without carrying on the other accounts directed by the decree; and there must be an inquiry as to the circumstances under which the 1,094*l.* 1*s.* 3*d.* was paid to the Plaintiffs (a).

(a) See *Reg. Lib.* 1852, A, fol. 1167.

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# WHEELER v. ADDAMS.

IN 1805, upon the marriage of *Mary Bishop* with *Richard Addams*, certain monies, and the produce to arise from the sale of some real estate, were settled upon trusts for the benefit of *Richard Addams* and *Mary* his intended wife, for their lives, with remainder to the issue of the marriage; but in case there should be no children of the marriage, or they should all die before their shares became vested interests, upon trust to raise 2,000*l.* for *Richard Addams*; and, in case *Mary Bishop* should be living at his decease, to assign to her the residue of the said trust funds and premises. The deed

July 5.

Trust funds were settled upon a husband for life, and if the wife should die in the lifetime of the husband, then, after his decease and failure of issue, "for such persons (other than the husband) as should then be the next of kin of the wife, and

would have been entitled thereto under the Statutes of Distribution, in case she had died sole, unmarried and intestate." Held, that her next of kin, at her own death, and not those at the death of her husband, were entitled.

In a limitation by deed, on a particular event, to the "then" next of kin of A., the word "then" was held to refer to the event and not to the time of its happening.

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deed then proceeded:—" But if the said *Mary Bishop* shall happen to die in the lifetime of *Richard Addams* then (the trustees) shall and do, immediately after the decease of *Richard Addams* and failure of issue," assign &c. the residue of the trust funds and premises to such persons as *Mary Bishop* shall appoint, and in default of appointment, " in trust for such person or persons (other than and except the said *Richard Addams*) who shall then be the next of kin of the said *Mary Bishop* and would have been entitled thereto under the statute for the distribution of the personal estates of intestate in case she had died sole and unmarried and intestate.

In 1826, *Mary Addams* died, leaving *Richard Addams* her husband, her surviving, without ever having had any issue, and without having exercised the power given by the settlement of 1805; her husband died in 1851.

At the time of the death of *Mary Addams*, her father, *Nathaniel Bishop*, was her next of kin, and would have been entitled to her personal estate under the Statutes of Distribution, in case she had died sole and unmarried and intestate; *James Bishop*, her brother, was her heir at law. The residuary legatee under the will of *Nathaniel Bishop* claimed to be entitled to his interest, if any.

A surviving sister and the children of two deceased sisters were the persons who would have been the next of kin of *Mary Addams*, and entitled to her personal estate under the Statutes of Distribution, if she had died at or immediately after the decease of her husband intestate and unmarried. They were also her co-heirs.

The object of the suit was to have the rights and interests of the parties declared and settled.

M

Mr. C. C. Barber, for the Plaintiff, a trustee, stated the facts of the case.

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Mr. Fane, for Ann Addams, the legal personal representative of Nathaniel Bishop and of her brother Richard Addams, contended, that the last clause in the deed of settlement was void for uncertainty.

Mr. Selwyn and Mr. T. C. Briggs, for the residuary legatees of Nathaniel Bishop, cited *Cable v. Cable* (a); *Bird v. Luckie* (b).

Mr. Lloyd and Mr. Chapman, for the children of Jane Hartley, one of the sisters of Mary Addams, contended, that the word "then" must be referred to the last period spoken of, that is, the death of Richard Addams. They admitted, that *prima facie* the expression "next of kin" meant next of kin at the death of the deceased person; but they argued, that a testator might point out and intend a class of next of kin to be ascertained at another period; *Beck v. Burn* (c); *Clapton v. Bulmer* (d). [*The Master of the Rolls*. But for the decided cases, I should have thought "next of kin" would mean what the law means, viz. persons at the time of the death of the party.]

Mr. Wickens, for the Attorney-General.

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*The MASTER of the ROLLS.*

I cannot concur in Mr. Lloyd's argument, unless I reverse what I have already held upon similar words.

It

- (a) 16 Beav. 507.  
(b) 8 Hare, 301.  
(c) 7 Beav. 492.

- (d) 5 Myl. & Cr. 108; 10 Sim. 426.

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It appears to me, that unless I hold the word "then" means "in that event," that is, in case of *Mary Bishop's* death without issue, I shall be producing a species of obscurity that would be most favourable for Mr. *Fane's* client. There is a limitation in favour of a distinct and particular class, namely, the next of kin of *Mary Bishop*, under the Statutes of Distribution, &c. Now such next of kin, entitled under the Statutes of Distribution, are a distinct and ascertained class of persons determined by the statute itself; and if I were to hold that it does not mean such persons, then what class can it mean? According to the argument, it must mean such persons as would have been the next of kin of *Mary Bishop*, in case she had died sole, unmarried and intestate simultaneously with her deceased husband, but such persons are not her next of kin under the statute.

If I so read the words, I should be doing much greater violence to the expressions than if I held them to describe the class of persons "as shall then," that is, in the event of her dying without issue in her husband's lifetime, be her next of kin. I must read the words in effect, as if they meant the ordinary next of kin of *Mary Bishop* at her death.

I think that the fact of this being a deed, and not a will, rather strengthens my view of the case; for in the case of a will, I might do more violence to the words, in order to carry into effect what I might ascertain, from the context and scope of the will, to be the general intention of the testator. I think that the only way that I can make this sentence rational is, by construing the word "then" as meaning "in that event," that is, in the event of *Mary Bishop* dying without issue in the lifetime of her husband. I will, therefore, make a declaration to that effect.

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## DIXON v. GAYFERE (No. 1).

## FLUKER v. GORDON.

July 13, 16.

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THE testatrix devised a real estate to *Gayfere* and *Welstead*, and their heirs, upon trust to sell and invest, and pay the income to *J. G.* for life, and (in the events which happened) to divide the produce between a class. The testatrix died in 1807, and *J. G.* in April, 1816. *Henry Gordon* thereupon became entitled to one-fourth of the unsold real estate under the will, and he purchased another one-fourth from the party entitled thereto.

Though by the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 34,) the right is extinguished at the end of twenty years, still adverse possession by a succession of independent trespassers, for a period ex-

ceeding twenty years, confers no right on any one of them who has not himself had twenty years uninterrupted possession, except as furnishing a defence to a trespasser in possession against an action by the rightful owner.


After both the trustee and *cestui que trust* had been out of possession more than twenty years, an ejectment was brought by *A. B.*, the heir of the trespasser, in the name of the trustee, and he obtained judgment. The trustee, who, disclaiming all personal interest, then instituted a suit, seeking to have the rights declared as between the rightful owner and the heir of the trespasser, and the Court, by its receiver, took possession. *A. B.* afterwards instituted a suit against the trustee and the rightful owner to recover the property. Held, that the Court being in possession, the Statute of Limitations had conferred no right, and did not apply.

*A.* wrongfully entered and died intestate; his widow entered. Held, that the possession of the widow was not a continuance of that of her husband, it not being shown that she was entitled to dower, and such a right not entitling her to enter into the whole estate.

A suit, dismissed as against the principal Defendant, and which, though pending as against the others, has yet been practically abandoned, does not prevent the operation of the Statute of Limitations.

## DATES.

|                |                                  |                                        |
|----------------|----------------------------------|----------------------------------------|
| 1807.          | Testatrix died.                  | 1838. Aug. 4. Mrs. Dunbar died.        |
| 1816.          | Tenant for life died.            | 1839. } Proceedings at law by heirs of |
| 1818. Aug. 6.  | Henry G. died, and Dutton enters | 1840. } Dunbar in name of Gayfere.     |
| 1818. Dec.     | Dunbar buys of Dutton.           | 1842 Suit of Gayfere v. Neely.         |
| 1820.          | Suit of Gordon v. Dutton.        | 1843. Receiver appointed.              |
| 1837. Feb. 28. | Dunbar died.                     | 1850. Dixon v. Gayfere.                |
|                |                                  | 1852. Fluker v. Gordon.                |

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thereto. On the death of J. G., *Henry Gordon* entered into possession, and he died on the 6th of *August*, 1818. By his will (as was held by the Court) he devised his own one-fourth to *Henrietta Dutton*, but he allowed the remaining one-fourth to descend on his heir at law, *Charles Henry Gordon*, then an infant. On the death of *Henry Gordon*, *Henrietta Dutton* entered into possession of the two-fourths, but, as to one-fourth, wrongfully and adversely to the infant heir of *Henry Gordon*.

In *December*, 1818, Mrs. *Dutton* sold and conveyed the two-fourths to *Nathaniel Dunbar*, who thereupon entered and retained possession until the 28th of *February*, 1837, when he died intestate and without issue. His widow thereupon entered and remained in possession until her death, which happened on the 4th of *August*, 1838. The heirs of *Nathaniel Dunbar* were then unknown, and, in consequence of adverse claims, the tenants refused to pay their rents to any one.

In the year 1839, *William Neely* and *Samuel Neely*, the co-heirs of *Nathaniel Dunbar*, commenced actions of ejectment against one of the tenants, in the name of *Thomas Gayfere* (the trustee), as the lessor of the plaintiff, and recovered judgment and possession of five acres of the property. In 1840, three other similar ejectments were commenced, and verdicts obtained. Upon this, *Thomas Gayfere* (the trustee) filed his bill (*Gayfere v. Neely*), in *June*, 1842, against the *Neelys* and *Charles Henry Gordon*, to stay these ejectments, and to have the rights of all parties to the property ascertained and declared. On the 11th *February*, 1843, a receiver was appointed of these estates, and by means of actions brought by the direction of the Court, possession of the whole of this property was finally obtained in 1847. The *Neelys* were appointed receivers, with-

out

it salary and without security, of the portion recovered  
r them, and the rents of the property were received  
nder the authority of the Court. *Gayfere* became of  
isound mind and his suit was not prosecuted, no fur-  
er steps having been taken therein. But on the 11th  
*February*, 1850, *Dixon*, who had purchased *Samuel*  
*Neely's* share, filed the first of these bills, praying that he  
ight be declared to be entitled to one undivided moiety  
the property, and that the legal estate therein might  
conveyed to him, and that the rights of all parties in  
e rest of the property might be ascertained by the  
ourt. The share of *William Neely*, the other co-heir  
*Nathaniel Dunbar*, became vested in *Fluker*, who  
*July*, 1852, purchased *Dixon's* undivided moiety.  
*Fluker* thereupon filed the second bill of *Fluker v.*  
*Gordon*, claiming half of the property. He prayed a  
eclaration to that effect, and for a conveyance of the  
egal estate from *Ann Elizabeth Gayfere*, the heiress  
t law of *Thomas Gayfere*, in whom the legal estate  
as now vested.

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To the foregoing statement it is necessary to add, that  
*Charles H. Gordon*, the heir of *Henry Gordon*, attained  
wenty-one on the 25th of *March*, 1823. He never  
as in the possession of the property, but in 1820, he,  
y his next friend, filed a bill in this Court (*Gordon v.*  
*Dutton*) to enforce his rights as heir-at-law to one-fourth  
of the property. That suit was, in *December*, 1837, dis-  
missed for want of prosecution as against *Gayfere*, the  
rustee, in whom the legal estate was then vested; and  
hough not dismissed as against the other Defendants,  
et no further steps had been taken in it.

The one-half of the property was claimed, on the one  
hand, by the Plaintiff *Fluker*, under the co-heirs of *Dun-*  
*bar*, who purchased of *Dutton*, and on the other hand  
one-fourth

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one-fourth was claimed by the Defendant *Wm. H. R Bailey*, who had purchased the interest of *Charles H Gordon*, the heir of *Henry Gordon*. The question was argued on the effect of the Statute of Limitations, 3 & 4 Will. 4, c. 27.

Mr. Lloyd and Mr. J. H. Taylor, for the Plaintiff *Fluker*, claiming under Mrs. *Dutton*, Mr. *Dunbar* and his heirs. All the rights of the heirs of *Henry Gordon*, and those claiming through him, are barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27. Adverse possession commenced on the 6th of August, 1818, and has ever since continued, for the heir has never been in possession. By the 2nd section, no land is to be recovered but within twenty years after the right of action accrued; and by the 24th section, the act is to apply to suits in equity as well as to actions at law. The personal disability of *Charles H. Gordon* ceased on his attaining twenty-one in 1823; he then had only ten years under the 16th section, and five years under the 15th section, to assert his right. But now, by the 34th section, his right is altogether extinguished.


The suit of *Gordon v. Dutton* does not affect the question, for it had been dismissed as against the principal Defendant, and was practically abandoned. The mere existence of a suit does not prevent the operation of the statute; *Bampton v. Burchall* (a). The appointment of a receiver did not alter the existing rights of the parties; the *Neelys* had a right to the fruit of the judgments in ejectment, and could not have been deprived of their possession under it by any person whose right accrued more than twenty years previously. They also referred to *Hunter v. Nockolds* (b).

Mr.

(a) 5 Beav. 67.

(b) 1 Macn. & G. 640.

Mr. Roupell, Mr. Craig, Mr. Rogers and Mr. Lambert, for Bailey, claiming under Charles H. Gordon, the heir of Henry Gordon. The statute is inapplicable to the Plaintiff's case, and gives him no rights. On the death of Nathaniel Dutton, the possession of his wife was not under him and in continuation of his wrongful possession, but separate, distinct and adverse. No one has had twenty years uninterrupted possession, so as to acquire a right by the lapse of time. The subsequent and the present and existing possession of the Court, by its receiver, must enure to the benefit of the rightful owner. The peculiarity of the case is, that there is an outstanding legal estate in a trustee, who sets up no adverse claim: the Court, and not the Plaintiff, is in possession, and is called upon to decide, as between parties out of possession, who is the rightful owner and has the best right to call on a willing trustee for a conveyance of the legal estate; *Willoughby v. Willoughby* (a).

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The proceedings in ejectment were in the name of *Gayfere*, the trustee, and he alone acquired any rights under the judgment; he alone has the legal right to the possession of the property, and the possession thus obtained by him would revive the right of his *cestui que trust*, if ever it has been suspended. You must test this case in the same way as if *Gayfere v. Neely* were at the hearing, and the trustee, disclaiming all interest in the property, asked the Court to declare, which of the claimants was his *cestui que trust*, and to determine which of them was entitled to be clothed with the legal title, and be put into possession. The Statute of Limitations only applies by way of defence in favour of a person in possession. Here, the Court is in possession, and, at law, the trustee alone has the right to enter.

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(a) 1 Term Rep. 763.

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 of itself prevents the operation of the statute.

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 FLUKER Bennett, Mr. Collins, Mr. De Gex and Mr. Metcalf
 v. fe,
 GORDON. for other parties.

Mr. Lloyd, in reply.

The MASTER of the ROLLS reserved judgment.

August 1. The MASTER of the ROLLS.

The important question in this suit, and that on which I reserved my opinion, is, the effect of the Statute of Limitations of the 3 & 4 Will. 4, c. 27, under the circumstances which I am about shortly to detail. The question appears to me to be one of considerable nicety, and also one of great importance. [*His Honor stated the principal circumstances, and proceeded.*] On the death of *Henry Gordon*, on the 6th of August, 1818, *Henrietta Dutton* entered into possession of the property. This possession, clearly and confessedly, was adverse to the heir at law, although he was then, and for four and a half years afterwards, continued to be an infant.

The time specified by the statute began to run on the 6th August, 1818; if, therefore, *Nathaniel Dunbar* had lived till the 6th August, 1838, that is, eighteen months longer than he did, he would, undoubtedly, have acquired a good title under the statute; for as the 16th clause of the statute, which saves disabilities for ten years after the disability ceases, would have protected *Charles H. Gordon* only till the 25th March, 1833, the lapse of the twenty years would have been a complete bar. On the

th of *Nathaniel Dunbar*, his widow, *Mary P.*, entered into possession of the property, and on the 4th of *August*, 1838.

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important to bear in mind, that, during the this time, the legal estate in the property in had been outstanding in the trustees of *Eliza- rdon's* will; and at this time, it was and continued ll after the institution of this suit, vested in *Gayfere*, a Defendant to the original bill, but ceased, who was the heir at law of the surviving

e I proceed further, I should also state, in re- the suit of *Gordon v. Dutton*, instituted in 1820, les *H. Gordon* by his next friend, to enforce as heir at law of *Henry Gordon*, to his undi- urth of the property, that I am of opinion, that ence of this suit does not, in any degree, affect ion I have to determine, and that it has no preventing the operation of the statute. Were l otherwise, I do not see how I could stop short g, that a bill filed would, in every case, prevent ration of the statute, although the Defendant eally know nothing about it. It was an aban- nit, to all intents and purposes, and one which, had been dismissed as against *Thomas Gayfere*, t have been revived against him (*a*), or effectu- ecuted as long as he lived. I, therefore, dismiss ideration of it, and in the examination of the before me, I shall treat it as if no such suit been instituted.

real and substantial question on this undivided fourth

Lautour v. Holcombe, 11 *Sin.* 71, and affirmed by Lord , 1 *Phillips*, p. 265.

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fourth has next to be considered, and notwithstanding some complication of facts, it may, as it appears to me, be thus stated :—Here is a property, the legal estate in which is outstanding in a trustee. The equitable owner of it died intestate in 1818. A person having no title entered into possession of it and receives the rents and profits thereof for eighteen years and a half. On his death another person, being as little entitled as himself, entered into possession and receives the rents for one year and a half more. After this, for four years, the tenants refuse to pay their rents to any one, and they alone are in possession ; at length, after the lapse of twenty-four years from the death of the equitable owner, the trustee files a bill, claiming no interest therein himself, but praying this Court to ascertain and declare who are the persons entitled to this property. The Court takes possession of the property accordingly, by its receiver, and though the trustee does not prosecute his suit, various claimants instituted proceedings for the same purpose, and substantially, it appears to me, that the rights must be the same as if the trustee had brought his suit to a hearing, and that this suit were now before me to be decided.

The persons who claim this property are, first, the heir of the person who entered on the death of the equitable owner, and who retained possession for eighteen years and a half, and next the heir of that equitable owner. The first thing that strikes me is the objection to the title of either. To the first it is urged, that the statute has not given him, or the person through whom he claims, any right or title ; and to the second it is urged, the statute has actually taken away all his right and title. If the trustee had entered into possession, and had claimed to do so beneficially, it would probably have been very difficult to have dispossessed him, but
 he

He disclaims all interest, and desires this Court to determine who it is that is entitled.

After having, as carefully and attentively as I am able, considered this question, I am of opinion, that the heir of the equitable owner, that is, *Charles H. Gordon*, and those who claim under or through him, are entitled to the declaration of the Court in their favour. If *Nathaniel Dunbar* had lived till the twenty years had expired, he would undoubtedly have acquired a right against the whole world, because, in order to meet the exigences of society, the Statute of Limitations has this peculiarity, that it in fact turns a bad title into a good one, provided it has not been interfered with for twenty years. But when the statute converts twenty years wrongful possession into a right, it requires that that full length of time should have elapsed, as a condition before such conversion. If I could allow eighteen years and a half to constitute such a right, why could I not allow a shorter space of time to perform the same office? and if I did so, I should, in effect, repeal the statute.

It is urged, in this case, that the possession of the widow of *Nathaniel Dunbar* must be treated as a continuation of the same possession as that of her husband, and that the same possession must be considered to continue, until a fresh and adverse possession is taken; and it is argued, that therefore, the time which elapsed, during the refusal of the tenants to pay rents to any one, must still be referred to the prior possession. I dissent from both these propositions. In the first place, the possession of the widow was certainly not a continuance of the possession of *Nathaniel Dunbar*; she had no right under him; he died intestate and without issue; and if she had any claim to dower, none such is proved before me, nor would that right have entitled her

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her to enter into possession of the whole estate. She was as much a trespasser as *Nathaniel Dunbar* himself and if the time which elapsed during the non-payment of the rent is to be attributed to the last possession, the four years of recusancy by the tenants is attributable to her possession, and not to that of her husband. If a series of trespassers, each adverse to one another, and to the rightful owner, take and keep possession of an estate, in succession, for various periods each less than twenty years, but exceeding in the whole twenty years, in whose favour (if this Court has possession of the estate, as in this case it has) is the right to be declared? Is it to be in favour of the one of the trespassers who has held the estate for the longest period? Is it to be in favour of the first of them or is it to be in favour of the last of them? The objections to each and every of them, obtaining such a declaration, appear to me to be insuperable. At law, no doubt, the person possessed of the legal estate would obtain possession, or if the legal estate could not be shown to be in any one, the last possessor, that is, the person actually in possession, would hold the property but not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants. If the *Neelys* had actually obtained possession under the ejectments brought by them, it might possibly have been impossible for *Charles H. Gordon* to have obtained possession either in equity or at law, even if he could have shown that *Henry Gordon* was legal owner in fee when he died, inasmuch as, in that case, the bar imposed by the 34th section of the statute, which says, "that no one shall bring an action or institute a suit for the recovery of land after twenty years from the time when the right of action accrued," might have constituted an insuperable bar to such recovery. But this is a very different case; here, the Court is in possession

session of the estate; it cannot keep it for itself, and it **has** to determine who is the person entitled. The statute, which imposes a bar against the institution of a **suit** after twenty years to recover possession, does not **impose** any bar upon the Court's declaring who is **entitled** to an estate which is in the possession of the Court **itself**. It is obvious, that the statute neither does nor **was** framed with any view or intention of meeting such a **case**, or of effecting any such object.

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Such a case as the following, which is but one of **many** which might be suggested, would show the **impossibility** of giving any such construction or operation to the statute:—Suppose that on the death of the **equitable** owner in fee simple of an estate it became **impossible** to ascertain who was his heir, and that thereupon the trustee entered into possession of the property, and **accumulated** the rents for the person, if any one, who **might** establish a title thereto, and that after a lapse of **twenty** years, various persons claimed to be the heir of the **equitable** owner, and that thereupon the trustee, **disclaiming** all interest in himself, filed a bill and prayed **that** this Court would determine who was the person **really** entitled. Is this Court to be precluded from **acceding** to that prayer, and from so determining, because **no** suit had been instituted for upwards of twenty years, **either** to recover possession or to declare the right? **Clearly** not. Is the case varied, in the slightest degree, **because** on the death of the equitable owner, and before the trustee took possession, a stranger entered into **possession** of the estate? I answer this question also, **clearly** not. If the stranger has acquired a right by his **possession**, he may enforce that right; but if his possession **has** not been sufficiently long to create such a right, he, **in** my opinion, gets nothing, he is entitled to nothing.

I am

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I am of opinion, therefore, that in the circumstances of this case, which are very peculiar, the Statute of Limitations, having conferred no right, does not apply, and that this Court must ascertain and declare the rights of the parties, exactly in the same manner as if that statute did not exist.

The result is, that I must declare, that the Defendant, *William Henry Ricketts Bayley*, as the purchaser from *Charles H. Gordon*, the heir of *Henry Gordon*, is entitled to the undivided moiety of this property, which belonged to *Henry Gordon*, and that a conveyance must be made to him accordingly.

As the result of this decision will be, that the Defendant *Bayley* will get the benefit of this suit, a benefit of great advantage to him, and the more so because the statute would have precluded him from instituting any suit himself for the purpose, he cannot ask that the Plaintiff should pay him any part of the costs of the suit. Neither can the Plaintiff ask that the Defendant should pay him any part of his costs, for it being obvious, that matters had come to such a pass, that unless by the intervention of the Court, the parties could not have extricated themselves from the difficulties in which they were involved. I think it best, therefore, to make the declarations I have already stated, and to direct conveyances in conformity therewith, and that all parties shall pay their own costs, except the costs of the trustee *Ann Elizabeth Gayfere*, whose costs must be paid, as between solicitor and client, by the Plaintiff, half of which costs he is to have over again against the Defendant *Bayley*.

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FLUKER v. GORDON.

July 13, 15, 16.


August 1.

ELIZABETH GORDON devised some real estate to two trustees in fee, upon trust to sell, and after payment of her debts and legacies, to invest the residue and to pay the interest to one for life, and afterwards to divide the trust monies amongst a class. The whole of the property, except four farms (which were the subject of the present suits) had been sold under a decree in a suit (*Gordon v. Welstead*), for carrying the trusts of the will into execution, but the four farms continued unconverted. The tenant for life died on the 29th of April, 1816, and thereupon *Henry Gordon*, who became entitled in possession to one-fourth of these farms, entered into possession thereof. By his will, dated the 20th of August, 1816, he gave all his real and personal estate to *Henrietta Dutton*, and died on the 6th of August, 1818. The trusts for sale contained in the first will were such as absolutely to convert the real estate into personality; and the question was, whether the share of *Henry Gordon* passed by his will, and this depended on whether, at his death, it retained the character of personality, or had been reconverted. There were no facts in this case, from whence such an intention was to be inferred on the part of *Henry Gordon*. He was not proved to have said or done anything leading to that conclusion.

Where real estate is bequeathed in the character of personality, and is enjoyed unconverted by the legatee, slight circumstances are sufficient to raise a presumption that he has elected to retain it as realty. In the absence of any other circumstances, the fact that a person has, for a great length of time, preserved the property in its actual state, will be sufficient to induce the Court to come to this conclusion.

A. B., being entitled to an undivided share in a real estate, impressed with the character of personality,

retained possession for between two and three years, and died without having said or done any thing to indicate an intention to reconvert. Held, that, at his death, it was personality.

1853. Mr. *Lloyd* and Mr. *J. H. Taylor*, for the Plaintiff,
 contended for a conversion into real estate.
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 v.
 GAYFERE. Mr. *Roupell*, Mr. *Craig*, Mr. *Rogers*, and Mr. *Lam-*
 FLUKER bert, for the principal Defendant, *contra*.
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 GORDON.
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August 1. *The MASTER of the ROLLS.*

The question is, whether this one-fourth part, to which *Henry Gordon* was entitled, passed by his will. It depends upon whether this share, which was clearly personal property under the will of *Elizabeth Gordon*, had been re-converted into realty by *Henry Gordon*; in other words, whether, from the facts of this case, it is to be presumed, that he elected to retain it in its then actual state.

Slight circumstances are, no doubt, sufficient to raise this presumption, and in the absence of any other circumstances, the fact that a person did, for a great length of time, preserve the property in its actual state, will be sufficient to induce the Court to come to this conclusion.

There are no facts in this case, from whence such an intention is to be inferred. He is not proved to have said or done anything leading to that conclusion. Time alone, if anything, can be relied on for this purpose. The time alone, in this case, is not sufficient for this purpose. It was an undivided share, and *Henry Gordon* certainly did not enter into possession of it before 29th of *April*, 1816, and he made his will in *July* following, being but three months afterwards. This is manifestly an insufficient

ficient time; and although he died in *August*, 1818, without having sold it, that is not sufficient to make me presume, that he elected to take it as real estate, far less that he had done so at the time when he made his will.

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NOTE.—See *Griesbach v. Fremantle*, ante, p. 314.

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May 4, 6, 26,
 27.

August 1.

BY charter, dated in 1151 (the original of which was not in existence, but was referred to in the register of the Bishop of *Winchester*, in 1200), *Henry de Blois*, Bishop of *Winchester*, and brother of King *Stephen*, Court will presume, from the uniformity of the practice or use, that it

is in accordance with the original foundation or right, and will presume whatever may be necessary to give it validity; but no such presumption can arise, from practice for a very long period, if an origin contrary to such practice is proved.

A benefice is not made spiritual because it can only be held by one in holy orders. A hospital for poor without cure of souls is a lay foundation, although the master is required to be in holy orders.

In practice, the office of Visitor of a Charity has become merely nominal, its duties, and functions being rarely spontaneously performed.

In cases of charitable trusts, the Court has authority to see them properly performed, notwithstanding there may be a special or general Visitor.

The Hospital of *St. Cross*, the origin and foundation of which were unknown, was re-founded and endowed for the maintenance of thirteen poor and impotent men (with relief to other poor according to the means of the house), under the government of a Master, who was to be appointed by the Bishop of *Winchester* for the time being. Within the precincts of *St. Cross*, another foundation, called *Noble Poverty*, was established for two priests, thirty-five brethren and three sisters, but no charter was now in existence, and it had long since been practically united to *St. Cross*. In 1696, a document called the *Consuetudinarium* was drawn up, declaring the Master to be entitled to the surplus revenues, after providing for a limited number of poor and the repairs of the house. Held, that it was inconsistent with the objects of the charity and the clear intentions of the founders; and that the jurisdiction of the Court to compel the due performance of the charitable trust was not taken away, though the founder had appointed a special or general Visitor.

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committed to the guardianship and administration of the master and brethren of the Hospital of *St. John* of *Jerusalem*, the *Hospital of the Poor of Christ* or *St. Cross*, or *Holy Cross*, which was founded at an earlier period in the parish of *St. Faith*, without the walls of *Winchester*, but which he had just founded anew, for the support, maintenance, lodging and clothing of thirteen poor men, who should reside there permanently. It proceeded, "Besides these thirteen poor men, one hundred other poor and modest persons, of the most indigent that can possibly be found, shall be received at the hour of dinner, to whom a coarser loaf of the same weight (as above) shall be given, and one dish, as shall seem meet, according to the convenience of the day, and a cup of the same measure, who, having left dinner, may be allowed to take away whatever of food or drink shall be left over." The passage in the original Latin concluded as follows:—"Alia quoque beneficia egeantibus quibuslibet misericorditer impertiri mandamus secundum domus ipsius facultatem." "All these things I have appointed to be observed in the aforesaid house of God, for ever to be continued and faithfully preserved by you, but preserving in all things the canonical jurisdiction ('justice' in the original) of the Bishop of *Winchester*, that the appointment and admission of the prior of the said hospital may be by the hands of the said Bishop. And that the rents, together with all the appurtenances, bestowed upon the hospital by me, may remain, without disturbance or misapplication, for the purposes of the said hospital."

Among the property thus bestowed by the Bishop were the churches of *Furham*, *Nutschalling* and others.

By an agreement, dated 10th April, 1185, and confirmed by a charter of King *Henry* the Second, the Hospital

Hospital of *Saint John of Jerusalem* assigned the guardianship and administration of the Hospital of *St. Cross* to *Richard de Jocelyne*, the then Bishop of *Winchester*, who added one hundred poor to the one hundred already provided for, and granted certain property to the hospital, not now enjoyed by it.

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The latter part of the recital of the object of the charity was, in these words: — “And the aforesaid *Richard* Bishop of *Winchester*, for the honour of God and the health of the soul of the lord the king and his own, has added one hundred poor to the aforesaid one hundred and thirteen poor persons, so that two hundred of them shall, for ever, according to the institution of *Henry*, formerly Bishop of *Winchester*, made concerning the one hundred in the aforesaid House of *St. Cross*, be fed; and thirteen, according to the ordination of the same, shall be fed and clothed; nor shall it be ever lawful to him the said *Richard* Bishop of *Winchester*, nor to any of his successors, to convert the alms, deputed to the feeding of the poor in that house, to another use, nor to diminish the number of such two hundred and thirteen poor.” It thus clearly expressed the continuance of the trust which had already been created.

The guardianship and administration of the hospital became again vested in the Hospital of *St. John of Jerusalem*, by grant of King *Richard* the First, dated 6th *September*, 1189, but repeating the original trusts, and especially the concluding one, “*Alia quoque*,” &c. &c. Afterwards, by an award of a papal commission, and by release and quit claim from the Hospital of *St. John of Jerusalem*, the guardianship became finally vested in the Bishop of *Winchester*.

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In 1336, a question arose as to whether the *Mast* ship of the hospital was a benefice with cure of souls and a commission, dated the 8th of *April* of that year was issued by the Bishop of *Winchester*, to inquire whether the custody of the Hospital of the *Holy Cross* was without cure of souls, and could be held with another ecclesiastical benefice. The finding was, that the custody of the House of the *Holy Cross* was free and exempt from all cure of souls aforesaid, and that the churches of the *Holy Cross* of *Farham* and *Twyford*, &c. were annexed and appropriated to the said house and custody not curated; "and they, as well as other ecclesiastical benefices, might be held with it, exempt from all cure of souls, and that the churches of the *Holy Cross*, and other churches therein named were annexed and appropriated to and dependent on this house and custody, not curated:" "that the same custody, not being curated, might be retained" by a rector of a parish, and that it "was constituted as a perpetual benefice, to which collation might be made and secular clerks assigned to the same, and should and ought to be free from taking any oath, the making of an inventory, and the charge of rendering any account of the administration of the goods; and that the warden, after institution and induction into the corporal possession of the custody aforesaid of the goods, fruits and profits, might freely dispose thereof, without rendering any account."

Both before and after this commission great irregularities prevailed in the administration of the charity, and nothing was done to remedy the mischief till *William* of *Wykeham* became Bishop of *Winchester*.

The Bishop claimed the right of visitation, and called
 on

on *William de Stowell*, the then master, to account for his administration of the charity. *William de Stowell* apparently, in the first instance, resisted the right, but he afterwards read his renunciation and submission, which was as follows :—

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“ I, *William de Stowell*, rector of the church of *Burgh-clerc*, in the diocese of *Winchester*, but lately master or warden of the eleemosynary hospital of poor persons of the *Holy Cross*, near *Winchester*, of the said diocese, considering and mindful for various reasons, as well from letters apostolic as other legitimate documents, and other evidences, and *ex officio* informations of the most Reverend Father Lord *William*, by the grace of God Bishop of *Winchester*, who, in his place of diocesan and patron, has pronounced, exhibited and shown, by judgment against me, in a matter concerning the said hospital, that the said hospital or almshouse was first founded and endowed by *Henry*, of good memory, brother-german of *Stephen*, King of *England*, formerly Bishop of *Winchester*, for poor and weak persons there assembling, and was first founded and endowed from the goods of the aforesaid founder; and that all and singular such goods are for the use of the poor aforesaid, and not to be converted to other uses, except a reasonable and moderate support of the master or warden aforesaid.”

William de Wykeham afterwards issued another commission, dated 30th *July*, 1370, to inquire into the irregularities, and the state of the hospital. Sir *Roger de Cloune* was the then master, and being summoned before the commissioners, he pleaded that the hospital was a perpetual ecclesiastical benefice sinecure, free from all obligation of making oath or rendering account; that

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that it was principally founded for the honour of the worship of God, and had nothing of the nature of an hospital, and that the master had the free administration of all the goods, with the burden only of making a certain distribution to a certain number of poor. The commissioners decided against Sir *Roger*, and he appealed to Pope *Gregory* the Fourth, who issued his bull to the Bishop of *London*, directing him to adjudicate and decree what should appear to him to be just. The Bishop accordingly, in 1373, made his decree, negating the claims of Sir *Roger*, and finding "that the hospital or house of the *Holy Cross* was a hospital or house of alms, in its first foundation, for the poor, weak and imbecile of Christ, to the full number therein mentioned (being the number mentioned in the foundation), and that care should be taken that the said hospital, which was a temporal office, and should not confer any benefice upon any one, and that Sir *Roger*, then warden, and all the future masters, should be bound to take an oath, and to make a full and faithful inventory of the goods of the hospital, and that such inventory, and the account of his administration of such goods, should be annually rendered to the diocesan, and that Sir *Roger* should be effectually compelled, and also by ecclesiastical censures be obliged, to maintain the ordinances of the said hospital, as of a simple ecclesiastical benefice, according to the foundation." From this decree Sir *Roger* again appealed to the Pope, but in *January*, 1374, he renounced his appeal, and submitted.

It is next necessary to refer to the foundation and circumstances connected with another institution called "*The Alms-house of Noble Poverty*."

Cardinal *Beaufort*, Bishop of *Winchester*, by indenture,

ture, dated 3rd *January*, 1445, reciting, that by licence of **King Henry** the Sixth and with the consent of the master and brethren of the Hospital of *St. Cross*, he had founded, within its precincts, an almshouse called the "*Almshouse of Noble Poverty*," consisting of two priests, thirty-five brethren, and three sisters, under the rule and government of the Master of the Hospital, according to certain statutes and ordinances, and had given the master and brethren very many possessions, for the better performance by them of certain works of piety annually, as more fully contained in a certain indenture made between him and them, and dated 4th *February* then last past, to provide against any casual diminution or dilapidation of those possessions, granted to the master and brethren the parish church of *Crimdale*; and by a charter, dated 24th *July*, 1446, the Cardinal granted to the master and brethren the church of *St. Faith*, and other churches and possessions, for the same purpose.

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The intentions of the Cardinal did not, however, appear to have been fully carried out in his lifetime. After his decease, the master and brethren of the hospital granted to his successor, *William of Wayneffete*, Bishop of *Winchester*, and his heirs, all that foundation within the precinct of the hospital, and all the manors, churches and property comprised in the grants from the Cardinal.

By letters-patent, dated the 6th of *August*, in the 33rd year of the reign of *Henry* the Sixth, the King granted licence to *William of Wayneffete*, Bishop of *Winchester*, to erect and establish a perpetual hospital within the precinct of the Hospital of *St. Cross*, to consist of one rector or warden, two chaplains, thirty-five poor men, and three women, to be called "*The Hospital*
or

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or Almshouse of Noble Poverty," of Henry, Cardinal and Bishop, and that the rector or warden, chaplains, brethren and sisters, when the hospital should be so erected, should be a body corporate; that the said bishop might appoint the mode of electing the rector or warden, and might make statutes for the government of the hospital; that the bishop and his successors might collate and admit the rector or warden, the chaplains, &c., and might assign the manors, churches, &c., comprised in Cardinal *Beaufort's* grants, to the rector or warden, chaplains, &c., and procure the churches, hospitals and chapels to be appropriated to them, and that the bishop and his successors should be founders, patrons and protectors of the house.

By deed, dated 12th May, 1460, reciting the last-mentioned letters-patent, the Bishop of *Winchester* (*William of Waynesflete*) granted the manors, rent, churches, hospital and chapels to *Thomas Forrest*, rector or warden, and the chaplains, brethren and sisters of the hospital or almshouse of *Noble Poverty*, to hold to them and their successors for ever, in aid of their support.

Statutes were supposed to have been made by the bishop, but if so, they are not now in existence.

The master of *St. Cross*, at the time of the foundation of "*Noble Poverty*," appeared also to have been appointed rector or warden of the latter, which had long since ceased to exist as a separate foundation, and had, for all practical purposes, merged in *St. Cross*.

It appeared that a suit had been instituted to compel the hospital to pay first fruits and tenths, under the statute of 26th Henry the Eighth, which had been repealed


pleaded by 2 & 3 *Phil. & Mary*, but had been re-enacted by the 1st of *Elizabeth*, with this exception, that the statute was not to affect any hospital founded for the relief of the poor. The Hospital of *St. Cross* pleaded this exemption in the words of the statute, viz., that the hospital was founded and used, and the possessions thereof were employed, for the relief of the poor; and now the same hospital is founded and used, and the possessions thereof are employed, for the use of the poor. Those were the words of the decree which were set forth in the judgment of the Court of Exchequer. On this plea, the Court ordered the bishop to search his archives, for the purpose of ascertaining the truth of the premises, to which the bishop returned a certificate, the conclusion whereof is in these words:—"And we found, that the said house or hospital, at the time of making the act of Parliament recited in the writ, and long before, was founded and used, and the possessions thereof had been employed, in the relief of the poor, and that now the said house or hospital is used and founded, and the possessions are employed, for the relief of the poor:" whereupon the Barons of the Exchequer, called on the Attorney-General, and he not denying the plea, judgment was, in the 4th of *Elizabeth*, given in these words:—"It was adjudged by the same Barons, that the aforesaid warden or master of the hospital or house aforesaid, and the aforesaid hospital or house of the *Holy Cross*, without the walls of the city of *Winchester* aforesaid, be discharged from the first fruits and tenths aforesaid, from the time of making of the act of Parliament."

The next fact was one of considerable interest in this case. A statute was passed in 18th *Elizabeth*, which, after reciting "that the Hospital of *St. Cross* near *Winchester*, founded in the time of King *Stephen*, and having continuance

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continuance ever since, and sundry confirmations by the Queen's most noble progenitors, from time to time, for hospitality and relief of the poor," and then reciting that Dr. *Reynolds*, master of the hospital, had procured beneficial leases to be granted, secured by the seal in his custody, to *Ralph Cleverley*, to the impoverishment of the same, and in violation of the trust reposed in him, it enacted, that these leases so made should be utterly annihilate and made void, and that no others should be granted; and the act then went on to enact, "that the hospital shall be thereby established and confirmed for ever," and its property shall be enjoyed by it for ever, "to be employed and bestowed to those goodly and charitable uses, for the relief and sustentation of the poor, according to the lawful orders and consideration of the foundation of the same."

Notwithstanding the repeated defeats of the masters of the hospital in appropriating the revenues to their own use, a document called the "*Consuetudinarium*" was, in 1696, drawn up by Dr. *Mackland*, the then master of the hospital, and the brethren, with the steward and chaplain, upon the testimony, as it was declared, of the brethren and of the steward, who was then of the age of seventy-six, and had held his office for thirty-six years. This document recited, that, upon diligent and strict search among the records of the hospital, no statutes or footsteps of statutes could be found directing its government and regulation; but that it had been governed by customs taken from former grants and donations, the interpretation of which might occasion differences between the master and brethren; and it was thereby agreed between the parties, that the several customs hereinafter stated were those by which the hospital had been governed. The principal of these were, that the master should rule all persons in the
 hospital,

hospital, and should, by himself or the steward, receive all the revenues, and bear the whole charge of the house, and keep the church and house in repair, and the overplus, if any, he should retain to himself. And that he should appoint the steward, chaplain, &c. This document was confirmed by the then bishop of *Winchester*, on the 10th *July*, 1696; but with a proviso, that nothing therein should derogate from the statutes of the founder, if any such should appear. At this very time, the statutes and other documents were in their possession, in the strong box of the hospital.

Since the year 1696 down to the present time, the hospital had, with some trifling alteration, been regulated by the "*Consuetudinarium*."


In 1808, the Earl of *Guildford* was appointed master, and like his predecessors, after making the payments required for the support of the poor men and the repairs of the house, amounting to a comparatively small sum, he retained all the residue for his own use.

It appeared that the masters of the hospital had always, since 1524, been appointed by collation and institution, and inducted to the mastership of *St. Cross*, and rectory of *St. Faith*, in the same manner as a parson; but in all the instruments of Lord *Guildford's* appointment, the word "canonically," which is invariably prefixed to the words of institution in the case of parsons, was omitted, and he was collated, instituted and inducted to the mastership of *St. Cross* only, and not to the rectory of *St. Faith*.

An information was filed by the Attorney-General in *September*, 1849, against the Master and Brethren of the Hospital,

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Hospital, the Earl of *Guildford*, and the Bishop of *Winchester*, praying a scheme for the regulation of both charities, and a declaration that the "*Consuetudinarium*" was not a valid or binding document; that the two charities were distinct from each other; that the master of *St. Cross* had no right to any part of the income of *Noble Poverty*, either on behalf of himself or of the hospital, and that the system of letting, at inadequate rents and on fines, was improper and ought to be discontinued, and praying that an account of the property belonging to each foundation, and of the receipts and payments of the Earl of *Guildford* in respect of each, should be taken, and for other relief, all tending to carry out the original trusts.

The cause now came on for hearing.

The *Attorney-General*, the *Solicitor-General*, Mr. *Rolt*, Mr. *Follett*, Mr. *James*, and Mr. *Terrell*, in support of the information. The Hospital of *St. Cross* was founded at a very ancient period, the most remote period at which charitable institutions were established or arose in this country; but the precise date of its origin is lost in antiquity, and the original charter is not in existence, or at least cannot be found. That its objects and purposes, however, were always of a charitable character there can be no doubt; the language of the charter by *Henry de Blois* is clear upon this point, expressly stating that the institution was founded for the maintenance, clothing and lodging of poor and impotent men, and generally for the assistance of the poor and needy. A copy of this charter was registered in the registry of the bishop of *Winchester* sometime between the years 1328 and 1333; and it appears only to be intended thereby to re-establish the institution, which had then fallen into decay, upon its former charitable

fitable footing, but upon a more extended scale, and with a more liberal endowment to supply the wants of the poor. It is true that a limited number of poor is named, it being intended that the charity should open with that number, which was to be the root from which the rest was to spring. This appears from the direction in the charter on this particular head, which concludes with an injunction "compassionately to impart other assistance, according to the means of the house, to the needy of every description." So that the charity was intended by its founders to be of the most liberal and extensive character, the number of its objects being only limited by the means which the house, from time to time, might possess of affording assistance. These intentions ought now to be observed and carried out, the large funds of this institution ought not to be appropriated by the few, or by one, to the exclusion of the many; and the master of the hospital ought to be compelled to account for the whole revenues of the estates of both charities, as he was bound to do from the most ancient times. But it is said, that the hospital has been governed, and its revenues administered, under the authority of the "*Consuetudinarium*," a record of ancient usage, as it is called, made upon sufficient and proper authority, and confirmed by the then Bishop of *Winchester*; but the provisions of this document are entirely at variance with the foundation, and in direct contravention of all the charters and other documentary evidence in the possession of the parties at the time it was made, as well as of an act of Parliament. Besides, the parties to this document acted without authority, for they had no power to make statutes or ordinances at all, and their unauthorized acts, and the alleged confirmation of them by the Bishop of *Winchester*, who had no power to make new statutes, which was beyond his jurisdiction, are altogether null and void.

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But even if it were otherwise, his approval was qualified by a proviso, "that nothing therein should derogate from the statutes of the founder, if any such should appear." The parties to the making of the *Consuetudinarium*, no doubt, alleged to the bishop, that no statutes could be found, though they knew or might have known at the time that the statement was not true. The *Consuetudinarium*, therefore, simply amounted to an unauthorized agreement between the parties to divert the income of the estates of the hospital of *St. Cross* from the objects of the charity, to absorb altogether the revenues of *Noble Poverty*, and to give greater advantages to the master than he ever previously possessed. This, therefore, was a fraud upon the charity and the public, which the Bishops of *Winchester* have had no power to redress; for, although they had a supervision over the charity, and the objects of it, they had no power or control over the revenues. Hence the income of the charity has been for the most part appropriated by the masters to their own use, and whilst the revenues have greatly increased, the objects of the charity have diminished.

But Lord *Guildford* claims to hold the mastership as an ecclesiastical benefice, sinecure, and without any obligation to account; and he contends, that it is shown to be such a benefice by its being held for centuries by beneficiaries canonically appointed; and he therefore insists, that this Court has no jurisdiction. But it is the purpose of the foundation itself, and not the lay or clerical character of the persons of whom it is composed, which determines whether a foundation is lay or spiritual; and in this case, the charter of *Henry de Blois* expressly declares it to be for the support of the poor and impotent, that is, a lay or eleemosynary foundation; and in 1373, the Pope's commissioners decided

cided that it was a lay hospital for eleemosynary purposes; and again, in 1561, the Court of Exchequer, by deciding that it was exempt from payment of first fruits, indirectly came to the same conclusion. So that all authority is against the master, and clearly shows the hospital to be a lay charity, established for the benefit of the poor and needy. As specific trusts of a temporal nature have been created, and are to be carried into effect, and as third parties, (many of whom are to be ascertained as the funds of the charity increase,) have advantages provided for them by the founders, this Court has jurisdiction, and ought to exercise it for their protection. They cited *Green v. Rutherford* (a); *Ex parte Berkhamstead Free School* (b); *Attorney-General v. Wyggeston Hospital* (c); *Attorney-General v. Browne's Hospital* (d); *Attorney-General v. Pretyma* (e); *Attorney-General v. Archbishop of York* (f); *Attorney-General v. Earl of Clarendon* (g).

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Sir F. Kelly, Mr. Roupell, and Mr. Rawlinson, for the Earl of Guildford, the master of St. Cross. The charter of 1151 was not the original charter of foundation. The charity, even then, was one of ancient date, and its ordinances could only be ascertained by prescription and usage. These ordinances may have been modified in consequence of subsequent grants to the charity; but the rules and regulations under which the revenues were or are now raised and applied must be governed by usage. Accordingly, the *Consuetudinarium* was framed upon and in accordance with the prevailing usages, without favour or partiality for any party. This document, though not a statute, but only a record of ancient

(a) 1 Ves. sen. 462.

(b) 2 Ves. & B. 134.

(c) 12 Beav. 113.

(d) 17 Sim. 137.

(e) 4 Beav. 462.

(f) 2 R. & Myl. 461.

(g) 17 Ves. 491.

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ancient usage, embodied the rules by which the hospital was governed, in all probability from its commencement. It was made on sufficient and proper authority, and the rules therein laid down or expressed are not at variance with the objects of the foundation, nor illegal or invalid; neither are they inadequate or improper for the present regulation of the foundation or charity, or for the distribution and application of the increased rents. The general expressions in the original document are not to be taken or understood in their widest and most extended sense, but some limit must be fixed which may serve as a guide to the mode of regulating the hospital and its income. The hospital, being endowed with complete powers of self-government under episcopal supervision, had, by its constitution, the means and the authority to fix this limit, and accordingly did fix it by this document denominated the *Consuetudinarium*, which has ever since been acted upon; and the present master, when appointed, in 1808, adopted the established practice, or if he made any alteration, it was not for his own benefit but for the improvement of the condition of the poor provided for by the charity. He applied the revenues of the hospital to the repairs of the buildings and the maintenance of the house, and he thereout provided for the maintenance of the members of the foundation according to the charters and the established usage; but having amply provided for those objects, he thought he was entitled to do that which his predecessors, divines of exemplary piety and learning, had done, and he applied to his own use the surplus revenues; this he was justified in doing so both by usage and authority; *Thetford School Case (a)*; *Attorney-General v.*

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(a) 8 Rep. 130 b; 131 a.

The Mayor of *Bristol* (a); *Attorney-General v. Gascoigne* (b); *Attorney-General v. Brazen Nose College, Oxford* (c); *Attorney-General v. The Cordwainers' Company* (d); *Attorney-General v. Dulwich College* (e); *Attorney-General v. The Fishmongers' Company* (f); *Attorney-General v. The Grocers' Company* (g); *Attorney-General v. Smythies* (h); *Jack v. Burnett* (i); *Tanner's Notitia Monastica, Hampshire, St. Cross* (k); *6 Dugdale's Monasticon* (l); *Ayliffe's Parergon* (m).

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As to the foundation of *Noble Poverty*, it is very doubtful whether it was ever founded, or whether any charter was ever granted to it; but assuming this to be so, it has long since, and at some remote period not now known, ceased to exist, and it is not unreasonable to suppose, that the Crown might, by a new charter, have granted the property originally designed for it to, and have directed it to be amalgamated with, *St. Cross*. *The King v. Pasmore* (n); *The King v. Sir R. Atkins* (o); *Chitt. Prerog. Cr.* (p). But however that may be, the property of *Noble Poverty*, given by the cardinal and now remaining in the possession of the master and brethren, was by the charter of 3rd *January*, 1445, and 24th *July*, 1446, appropriated to them for their own proper use, and the Crown had no power to enable Bishop *Wayneflete* to grant it to the corporation of *Noble Poverty*. Neither can the founder, when once the charity

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| (a) 2 <i>Jac. & W.</i> 294. | (h) 2 <i>Russ. & Myl.</i> 717; 1 |
| (b) 2 <i>Myl. & K.</i> 647. | <i>Coop. temp. Brougham</i> , 5. |
| (c) 8 <i>Bligh</i> (N. S.), 377; 2 | (i) 12 <i>Cl. & F.</i> 812. |
| <i>Cl. & F.</i> 295. | (k) Page xi. |
| (d) 3 <i>Myl. & K.</i> 534. | (l) Page 721. |
| (e) 4 <i>Beav.</i> 255. | (m) Page 113. |
| (f) 2 <i>Beav.</i> 568; 5 <i>Myl. &</i> | (n) 3 <i>T. R.</i> 199. |
| <i>Cr.</i> 16. | (o) 3 <i>Mod.</i> 3. |
| (g) 6 <i>Beav.</i> 526. | (p) Page 126. |

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charity has been incorporated, alter the number of its members or impose new charitable objects upon it; *Attorney-General v. Dulwich College* (a); *The Queen v. Dulwich College* (b).

By the foundation of the hospital it was endowed with powers of continuing and governing itself, and was placed under the superintendence and care of the Bishop of *Winchester* for the time being as visitor. The charity, therefore, is complete in itself, and the Bishop of *Winchester*, as visitor, has complete and exclusive jurisdiction, not merely over the charity and its individual members, but also over the estates and revenues, including the property of *Noble Poverty*, which is in fact part of *St. Cross* and not a separate institution, and cannot now be dealt with or treated otherwise than as part of the original charity. The Court of Chancery, therefore, has no jurisdiction in matters within the visitatorial authority of the Bishop; *Philips v. Bury* (c); *Rex v. University of Cambridge* (Dr. *Bentley's* Case) (d); *Parkinson's Case* (e); *Dr. Walker's Case* (f); *Attorney-General v. Price* (g); *Attorney-General v. Smart* (h); *Attorney-General v. Middleton* (i); *Attorney-General v. Governors of Harrow School* (k); *Attorney-General v. Talbot* (l); *Ex parte Kirkby Ravensworth Hospital Case* (m); *Attorney-General v. Foundling Hospital* (n); *Attorney-General v. Magdalen College, Oxford* (o); *Whiston v. Dean and*
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- (a) 4 *Beav.* 255.
 (b) *Q. B.*, 19 Nov. 1851.
 (c) 2 *T. R.* 346; 1 *Ld. Raym.* 5; *Skin.* 447.
 (d) 1 *Str.* 557; 8 *Mod.* 148.
 (e) *Carth.* 92.
 (f) *Cas. temp. Hardw.* 212.
 (g) 3 *Atk.* 108.

- (h) 1 *Ves. sen.* 72.
 (i) 2 *Ves. sen.* 327.
 (k) 2 *Ves. sen.* 551.
 (l) 3 *Atk.* 662.
 (m) 15 *Ves.* 305; 8 *East*, 221.
 (n) 2 *Ves. jun.* 42.
 (o) 10 *Beav.* 403.

Chapter of *Rochester* (a); The *Sutton Colefield* Case (b); *Hynshaw* v. The Corporation of *Morpeth* (c); *Reg.* v. The Dean and Chapter of *Rochester* (d); *Reg.* v. The Dean and Chapter of *Chester* (e); *Morice* v. Bishop of *Durham* (f); *Co. Litt.* (g); *Shelf. on Mortmain* (h); 2 *Story, Eq. Jur.* (i); 1 *Black. Comm.* (k)

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In the reign of *Henry* the Eighth, no doubt, the hospital was visited by *Thomas Cromwell*, by virtue of a commission from the king; but that must have been under the provisions of the stats. 25 *Hen.* 8, c. 21, s. 20, and 26 *Hen.* 8, c. 1, and not by reason of any positive right in the king as visitor. Besides, the hospital is within the exemptions of stat. 43 *Eliz.* c. 4, and comprises governing powers within itself, so that the Court of Chancery has no jurisdiction over it or its revenues, that jurisdiction being vested either in the Bishop of *Winchester*, as diocesan, or in the Queen's Bench; The *King* v. Bishop of *Chester* (l); The *King* v. Bishop of *Durham* (m). And, in the absence of any evidence to the contrary, whenever a visitor is appointed, the presumption always is, that he is a general visitor; *St. John's College, Cambridge*, v. *Todding-ton* (n); The *King* v. Bishop of *Worcester* (o); and the Courts will never anticipate the judgment of the visitor or restrict him in his jurisdiction; 2 *Bac. Abr.* (p); *Attorney-General* v. *Talbot* (q). If any doubt however should exist, the Court of Chancery

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| (a) 7 <i>Hare</i> , 532, 558. | (i) Page 366. |
| (b) <i>Duke, Ch. Us. (Bridg.)</i> | (k) Pages 470, 480, 483. |
| 642. | (l) 2 <i>Stra.</i> 797. |
| (c) <i>Duke, Ch. Us. (Bridg.)</i> | (m) 1 <i>Burr.</i> 567; 2 <i>Ken.</i> 296. |
| 242. | (n) 1 <i>Burr.</i> 200; 1 <i>Ken.</i> 461. |
| (d) 20 <i>L.J. (N. S.) Q. B.</i> 467. | (o) 4 <i>M. & S.</i> 415; 1 <i>Burn's</i> |
| (e) 15 <i>Q. B. Rep.</i> 513. | <i>Ecc. Law</i> , 439 c. |
| (f) 10 <i>Ves.</i> 540. | (p) Page 282. |
| (g) Sect. 135, p. 95 a. | (q) 3 <i>Atk.</i> 674; 1 <i>Ves. sen.</i> 78. |
| (h) Pages 268, 334. | |

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can never determine who is visitor ; The *King*  
 Bishop of *Ely* (a).

In the next place, there is ground for contending that this is an ecclesiastical benefice sinecure, and not out any obligation on the master to account. It is the description of persons who are members of a charitable or other corporation, but the purpose of the institution, which characterizes it as being a spiritual foundation ; that is, the spiritual character of the corporations is not to be judged of by the lay or spiritual character of the members, but by the object and purpose to which it is appropriated and of which it is intended to carry out and the manner in which it has been dealt with ; *Grendon v. Bishop of Lincoln* (c); *Watson's Clergyman's Law* (d). The mastership of *St. Cross* is shown to be an ecclesiastical benefice sinecure, because, for centuries, it has been held by beneficiaries appointed by the canonical process of collation, institution and induction, with three successions, and those subsequent to the commission issued to *William de Wykeham*. It must, therefore, be presumed to have been an ecclesiastical benefice by the charter of foundation, which is now lost, or at any rate it must have had its inception in a legal origin ; *Attorney-General v. Murdoch* (e); *Attorney-General v. Middlesex* (f); *Queen's College Case* (g); and in such a case the lapse of centuries is not to be lost sight of, not merely as a guide to the original purpose of the foundation, but to explain anything in the charters that may be considered ambiguous ; *Mayor of Kingston-upon-*

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(a) 1 *Wils.* 266 ; 1 *W. Bl.* 52.

(b) *Plowd.* 493.

(c) Page 811.

(d) Page 28.

(e) 1 *De G. M. & C.*  
*Hare*, 445.

(f) 2 *Ves. sen.* 327.


(g) *Jac.* 1.

*Horner* (a); *Jenkins v. Harvey* (b); *Attorney-General v. The Mayor of Bristol* (c); *Chad v. Tilsed* (d). Besides, the mastership has been exchanged for benefices, which it could not have been had the foundation been lay; *Co. Litt.* (e); 1 *Bl. Comm.* (f); 1 *Kyd on Corp.* (g). It has also been held in commendam by bishops, and been the subject of royal presentation on advancement to bishoprics and of archiepiscopal options. The interference of the Ecclesiastical Courts with the affairs of the Hospital of *St. Cross* also proves it to be an ecclesiastical corporation and not a lay charity, especially as the Courts of Chancery and common law had anciently a jurisdiction over lay charities not having a general visitor; 2 *Story, Eq. Jur.* (h); 3 *Bl. Comm.* (i); 1 *Spence, Eq. Jur.* (k). And lastly, the Bishop of *Winchester* had always possessed canonical jurisdiction over the hospital, and therefore it must be an ecclesiastical benefice; *Sutton's Hospital Case* (l); *Lyndewood's Provinciale* (m); 1 *Bla. Comm.* (n); 2 *Kyd on Corp.* (o). But supposing the master to fail upon the points already urged, lapse of time will operate as a bar to the relief sought though in the case of a charity, and, unless in cases of express trusts, the Statute of Limitations (3 & 4 *Will.* 4, c. 27) will operate as a bar to any claim; *Commissioners of Charitable Donations and Bequests v. Wybrants* (p).

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As to leasing the charity estates, usage will also prevail

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| (a) 1 <i>Cowp.</i> 102.                               | ss. 1143, 1147.                  |
| (b) 1 <i>Cr. M. &amp; R.</i> 877; 5 <i>Tyrw.</i> 326. | (i) Page 427.                    |
| (c) 2 <i>Jac. &amp; W.</i> 314.                       | (k) Page 555.                    |
| (d) 2 <i>Brod. &amp; B.</i> 403.                      | (l) 10 <i>Co.</i> 31 a.          |
| (e) Page 342 a.                                       | (m) Page 151.                    |
| (f) Pages 470, 483.                                   | (n) Page 480.                    |
| (g) Page 23.                                          | (o) Page 180.                    |
| (h) Sixth edit., pp. 566, 570,                        | (p) 2 <i>Jon. &amp; La.</i> 195. |

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prevail in this as in other matters; *Attorney-General v Cross (a)*.

Lastly, the information, in case of *St. Cross* and *Noble Poverty* being distinct corporations, is multifarious; *Turner v. Robinson (b)*; *Marcos v. Pebrer (c)*; *Attorney-General v. The Corporation of Carmarthen (d)*; *Attorney-General v. Goldsmiths' Company (e)*; *Salvidge v. Hyde (f)*; *Attorney-General v. St. John's College, Cambridge (g)*; *Campbell v. Mackay (h)*; *Attorney-General v. Corporation of Poole (i)*; *Plumbe v. Plumbe (k)*; *Salomons v. Laing (l)*; *Inman v. Wearing (m)*; *Whaley v. Dawson (n)*; *Mitf. Pl. (o)*; *1 Dan. Ch. Pr. (p)*; *St. Eq. Pl. (q)*. But an objection of this kind could not be taken by the answer; *Greenwood v. Churchill (r)*; *Benson v. Hadfield (s)*.

They also referred to stats. 8 *Edw.* 3, Ass. pl. 29, c. 31; 25 *Edw.* 3, st. 6; 27 *Edw.* 3, st. 1, c. 1; 38 *Edw.* 3, st. 2, c. 1; 38 *Edw.* 3, st. 2, c. 4; 2 *Hen.* 5, c. 1; 31 *Hen.* 8, c. 13; 37 *Hen.* 8, c. 4; 1 *Edw.* 6, c. 14; 21 *Hen.* 8, c. 13, s. 7; 26 *Hen.* 8, c. 3; 2 & 3 *Ph. & M.* c. 4; 1 *Eliz.* c. 4, ss. 16, 17, 21, 23; 25 *Hen.* 8, c. 14; 1 *Eliz.* c. 1, ss. 16, 17; 3 & 4 *Vict.* c. 113, s. 65; 14 & 15 *Vict.* c. 104.

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| (a) 3 <i>Mer.</i> 524.                         | <i>nom. Parr v. Attorney-General</i>        |
| (b) 1 <i>S. &amp; Stu.</i> 313; <i>S. C.</i>   | 8 <i>Cl. &amp; F.</i> 409.                  |
| <i>nom. Turner v. Doubleday</i> , 6            | (k) 4 <i>Y. &amp; C.</i> 345.               |
| <i>Madd.</i> 95.                               | (l) 12 <i>Beav.</i> 339.                    |
| (c) 3 <i>Sim.</i> 466.                         | (m) 3 <i>De G. &amp; Sm.</i> 729.           |
| (d) <i>Coop.</i> 30.                           | (n) 2 <i>Sch. &amp; Lef.</i> 370.           |
| (e) 5 <i>Sim.</i> 670.                         | (o) Page 181.                               |
| (f) <i>Jac.</i> 151.                           | (p) Page 320.                               |
| (g) 7 <i>Sim.</i> 241.                         | (q) Page 190.                               |
| (h) 1 <i>Myl. &amp; Cr.</i> 603; 7 <i>Sim.</i> | (r) 1 <i>Myl. &amp; C.</i> 559.             |
| 564.                                           | (s) 4 <i>Hare</i> , 32; 5 <i>Beav.</i> 546. |
| (i) 4 <i>Myl. &amp; Cr.</i> 17; <i>S. C.</i>   |                                             |

Mr. *R. Palmer* and Mr. *Hobhouse*, for the Bishop of *Winchester*, contended, that he had power not merely to see the statutes and ordinances carried into execution, but to make new ones; and they relied on the uniform presentation by him to the churches given for the support of the hospital and of *Noble Poverty* as establishing his right to the patronage.

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The *Attorney-General*, in reply. The Bishop of *Winchester* has no power to make new statutes, and, even if he had, the bishop for the time being, by his confirmation of the *Consuetudinarium*, provided, that nothing therein should derogate from the statutes of the founder if any such should appear; and the provisions in that document are entirely at variance with the foundation, though, no doubt, the parties who framed it alleged to the bishop that no statutes could be found—a statement which they knew to be untrue. But the question is put beyond dispute as to the nature of the charity; first, in 1373, by the pope's commission; and again, in 1561, by the Court of Exchequer, whose decision is a direct authority against the master. The foundation is therefore intended for the poor, under the jurisdiction of the bishop, who is to admit the prior; but that person is not directed to be an ecclesiastic. All the saving clause does is merely to give the bishop the power of appointing the poor. Then the word “canonically,” usually prefixed to the institution of the parson, is not so in the case of the master. The mode of appointment is nothing, the bishop is accustomed to certain forms, and uses them whether they are required or not. A simple appointment under the bishop's hand, without induction, would be a good appointment, and Lord *Guildford* himself denied the mastership to be an ecclesiastical benefice. He was admitted and inducted to

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to the mastership but not to the rectory of *St. Faith* as his predecessors were, and took the tithes and accounted for them to the hospital; and as to *Noble Poverty*, suppose the crown had no power to enable Bishop *Wayneflete* to grant the property to it, still there is a trust vested in the master and brethren, for the churches, &c. were given to them "for the charges and works of piety aforesaid."

August 1.

*The MASTER of the ROLLS.*

The object of this information is to obtain a decree for the regulation and future management of two charities, which have been practically united together since the institution of the latter charity, under the title of "The Hospital of *St. Cross* at *Winchester*," and for the application of the funds belonging respectively to each of the charities.

The Hospital of *St. Cross* itself was founded by *Henry of Blois*, some time in the twelfth century. The charity or almshouse of *Noble Poverty* was created by Cardinal *Beaufort*, sometime in the year 1446. In the year 1696, a document, called the "*Consuetudinarium*" was drawn up by the master and brethren, and assented to by the Bishop of *Winchester*, which, in effect (subject to the support of thirteen brethren, and forty poor men, and two chaplains, and the repairs of the building), gives all the revenues to the master. This has been acted upon from that time to the present; and the object of this information is, to put an end to this system, and to obtain the application of the revenues to purposes of

arity, and to regulate this application by schemes properly adapted for this purpose.

The defence is, first, that these funds were not wholly voted to charity; secondly, that if they were, the practice, which has subsisted for above a century and a half, must prevail; and thirdly, that this Court has no jurisdiction in the matter, inasmuch as the Bishop of *Winchester* is the special visitor, and that he alone can be applied to, and is able to control or redress the misconduct, if any exist, in the charity; and as a branch also of that latter proposition, it is contended, that this is an ecclesiastical benefice.

It will be convenient to consider each of these charities separately, with reference to these questions. The hospital of *St. Cross* was founded by *Henry de Blois*, Bishop of *Winchester*, sometime in the twelfth century; whether there was an earlier foundation, or at what exact time it was established, does not appear to me to be material. [*His Honor stated the charter, and referred to the passage "Alia quoque," &c.*]

If there had been nothing more in the case than this document, there could, in my opinion, have been no doubt or question on the matter. This is as clear and distinct a trust for the general support of charity as ever was created. The daily experience of this Court

in charity matters, rarely meets with a case of a clearer and more distinct trust, or one which, in my opinion, is less open to contest. It is necessary, no doubt, to examine the subsequent proceedings; but if there be nothing to recall or alter this charter, this is, in my opinion, as plain a charitable trust as can be created, and one which it is incumbent on this Court to carry into effect.

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The records of the subsequent events attending this charity are interesting, as displaying the natural tendency to decay or perversion, which affects all institutions of this description; but more strikingly in the present case, than in most of those which I can call to mind.

In *April*, 1185, a dispute having apparently arisen between the Bishop of *Winchester* and the Brethren of the Hospital of *St. John of Jerusalem*, an agreement was entered into, by which the patronage of the hospital was transferred to the bishop, and the recital clearly confirms the original trust. In 1189, a charter was granted by *Richard* the First, granting the hospital back again to the Brethren of *St. John of Jerusalem*, but repeating the original trusts, and especially the concluding one of the original charter.

In the years 1332, 1336 and 1337, a sequestration and a commission, and various proceedings thereunder, took place, for the purpose of ascertaining whether the hospital was free from the cure of souls, which it was established to be, and which I shall have occasion to refer to in the latter part of my judgment. Considerable irregularities appear to have crept into the administration of the hospital at this period, and most of the revenues were taken by the master and applied by him for his own use, and little given to the charitable purposes for which it was originally founded. At this time, *William of Wykeham*, a man of great energy and zeal, to whom this country is deeply indebted for the successful exertions and sacrifices he made to promote education, was Bishop of *Winchester*. He thereupon claimed the right of visitation, and called on the master to account for his administration of the charity. *William de Stowell*, the then master, apparently in the first instance resisted

resisted this right, but afterwards read his renunciation and submission, which is important, as being a strong confirmation of the original document.

This is the first document which I have met with which contains a word about the master or his emoluments, and here it is only as subordinate to and for the purpose of effecting the main object of the charity.

However, Sir *Roger de Clowne*, who, I presume, was the immediate successor, resisted the authority of the bishop, and a sentence having been pronounced against him, he appealed to the Pope, who thereupon issued his bull, appointing a commission to inquire into the matter and decree what should be just. The proceedings under this commission are preserved and produced; the evidence under it was taken much in the same manner and as minutely as depositions in a modern suit. The commissioners appear to have called the parties before them, to be examined as witnesses, and their evidence is preserved. After which, they made a decree, which is also preserved, by which they decree, that the master shall take an oath to make an inventory, and render an account of his administration to the diocesan; and the decree specifies that the trusts of the property are, for the maintenance of four priests, three secular clerks, and one hundred poor men; it repeats the original trusts, and finally condemns Sir *Roger de Clowne* in costs. I think it unnecessary to go into any details of the evidence given before this commission on the subject now before me; but it cannot fail of striking any one as a singular circumstance, that the very question which is now tried before me, was tried nearly 500 years ago, under a commission appointed by the Pope,

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on a claim then as now advanced by the master to take the revenues of the charity to his own use.


There are no documents that have a material bearing on this subject from this time until the 4th of *Elizabeth*, in 1561, when a transaction took place strongly confirmatory of the original charter. [*His Honor next stated the proceedings in the Exchequer, in the 4th of Elizabeth (1561), under which the hospital was released from first fruits and tenths, on the ground of its being a hospital for the poor.*] During the whole of this time, not a single fact favourable to the case of the Defendants occurs, but every fresh proceeding appears to contain, if confirmation were wanting, the trusts of the original charter. [*His Honor next stated the statute of 18th of Elizabeth, avoiding the leases granted by the hospital.*] It is, therefore, impossible to conceive that a stronger or more singular continuance of stringent measures, for the purpose of preserving this hospital for the benefit of the poor, could have been devised, than those which were put in force. Not only is there here an original trust, which is plain, but it is repeated over and over again. Notwithstanding this repetition, about 200 years after its foundation, the master endeavours to appropriate its revenues to his own use; this is defeated by *William of Wykeham*, after severe litigation and an appeal to the Pope, and the trusts are re-established. This attempt is repeated in the reign of Queen *Elizabeth*, when an Act of Parliament was passed, defeating the attempt again, and prohibiting it for the future.

It might have been expected, that the master of the hospital, for the time being, would at length have been satisfied with these attempts and failures; but this is not so, and in the year 1696 (120 years after this act of *Elizabeth* had passed), one of the most extraordinary

dinary documents that ever was produced, and relied upon in a court of justice, is produced, and this is the document called the *Consuetudinarium*. This document begins by reciting, that search had been made amongst the records of the hospital, and that no statutes or traces of any statutes could be found, directing the government and regulations thereof. At the time they wrote this recital, they had in their possession a copy of the sentence against Sir *Roger de Clowne*;—a copy of the bull of Pope *Gregory*, respecting the abuses introduced by the master of the hospital, by the appropriation of its revenues, and appointing a commission to inquire into the same;—they had also a copy of the proceedings and evidence under the commission; besides which they had various documents, to which I shall shortly refer, relative to the establishment of the almshouse of *Noble Poverty*. These documents, then and now in their possession, contain ample evidence of the original rules and statutes, showing the object and destination of the charity to have been the very opposite of that to which they were about to convert it. The continuation of this document is of a piece with the opening. It recites, that it had been, time out of mind, governed by customs taken out of and in pursuance of the grants of the founders, the interpretation of which might occasion differences between the master and brethren, and in order to prevent which, the master and brethren had agreed on what the custom was, and thereupon they set forth a detailed account, and ask the Bishop of *Winchester* to sanction the custom so ascertained. Thereupon they proceed to settle the custom, or rather distribution, of the revenues of the charity, in elaborate detail, according to their own will and pleasure. Of the previous existence of this custom or mode of distribution, no evidence or trace of evidence is given, except that the steward, who had had thirty-six years' experience,

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rience, is said to have declared that it was so, while this distribution and alleged custom was in direct violation of an Act of Parliament passed 120 years before, and in direct opposition to the evidence and documents then in their own custody, which, it is the most favourable construction to put on their conduct to say, they did not think fit to refer to or to ascertain the contents of.

A more barefaced and shameless document than this *Consuetudinarium* could not well, in my opinion, have been framed, nor could a more manifest and probably wilful breach of trust have been committed by the master and brethren. The bishop who ratified this document did so with great propriety. He knew, and could know nothing upon the subject; he trusted to the word of the master and brethren, but he gave his confirmation so qualified as not to be in derogation of the statutes of the founder, if these should afterwards be discovered.

Since that time, to the filing of this information, the hospital has continued to be carried on, according to this glaring and (as I think) discreditable breach of trust, not certainly without warning, which has been given from various sources, amongst which I may refer to a striking opinion of Sir *William Wynne*.

To say that a practice so created, and under such circumstances, merely because it has continued for a century and a half, is to prevail against the manifest trusts imposed by the original foundation, would be contrary to the doctrine daily enforced by this Court, and would be to give a direct premium to fraud in the administration of charities. Presumption arising from time has nothing to do with this case. Undoubtedly, where the whole origin of a charity or a right is lost in  
 obscurity,

*obsc*urity, the Court will presume, from the uniformity of the practice or use, that it is in accordance with the original foundation or right, and will presume whatever may be necessary to give it validity. So here, if the recitals contained in the *Consuetudinarium* had been true, and there was no trace by which it could be discovered whether the original foundations were for charity generally, or merely to support a master and a few brethren, the presumption would have been, that the practice was in accordance with the will of the founder; but when the real origin is shown and clearly ascertained, nothing can be presumed to the contrary of that which is established by evidence.

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The remaining part of the case, as to this charity, relates to the jurisdiction of this Court. And first, I must state my inability to concur in the result to which I am endeavoured to be led by two learned arguments from Mr. Rawlinson and Mr. Roundell Palmer, delivered for the purpose of showing that this was a spiritual benefice. A benefice is not made spiritual because it can be held only by a person in holy orders; it is the object for which the house is established that makes it a spiritual or lay foundation. If a hospital be established for the relief of the poor, and if there be no cure of souls attached to it, it is a lay foundation, although the founder shall have annexed, as a qualification for the office, that no person shall be master or warden of it except a clerk in holy orders. That this Hospital of St. Cross was and is a lay foundation, I consider to be established by the original foundation, the proceedings in the time of William of Wykeham, and by those in the reign of Queen Elizabeth. I have already stated the original foundation, and the proceedings in the Exchequer in the reign of Queen Elizabeth, and a document in the time of William of Wykeham, which also estab-

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blishes this point. It is the exhibit marked T. T. There is, therefore, an express finding sometime between the years 1386 and 1405, that the mastership was without cure of souls. It is not alleged that it has now, or that it ever had, any cure of souls attached to it.

The only remaining point then, on this part of the case, is, whether the jurisdiction of this Court is taken away by reason of the visitorship of the Bishop of Winchester. If this were the law, it would be very unfortunate, for it does not require the history of this case to teach us, that the visitorship, vested in any whether a corporation sole or aggregate, or the heir the founder, is a mere nominal office, the duties and functions of which are rarely, if ever, spontaneous performed. But the law is not so. Where there is clear and distinct trust, this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a common law office and common law duties to perform, and does not superintend the performance of the trust which belong to the various officers, which he may take care to see are properly kept up and appointed. *Green v. Rutherford* (a), the case of the *Berkhampstead School* (b), and several other cases, expressly establish the authority of this Court in cases of trusts, and the duty of this Court to see that they are properly performed, notwithstanding that there may be a special or a general visitor.

I am of opinion, therefore, that the jurisdiction of this Court is not taken away, and that it is the duty of

(a) 1 Ves. sen. 462.

(b) 2 Ves. & B. 134.

Court to enforce the trusts, so far as they relate to the original charity or Hospital of *St. Cross*.

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I have refrained from saying anything hitherto respecting "*The Almshouse of Noble Poverty*," to found which, this hospital was endowed with a large portion of its present possessions by Cardinal *Beaufort*, in the reign of *Henry* the Sixth ; and I think it unnecessary to go through the documents in detail, for this (as it appears to me) very obvious reason, that the observations I have made, with regard to the original charity, apply with still greater force to that charity. In truth, it has scarcely been contended by the Defendants, that this charity, if it really was established, must not be carried into effect by this Court, for the main grounds of defence, resisting the interference of this Court to regulate the original charity, and which I may call the Hospital of *St. Cross* proper, are not applicable to this super-added charity. In truth, the arguments against the the jurisdiction of this Court, with respect to the property arising from the grants to endow and establish this charity of *Noble Poverty*, seem to me to resolve themselves into this, that from the absence of all records, it must be presumed, that the almshouses were never established in reality, and that therefore the lands and possessions given for that purpose must be considered as an endowment of the original hospital, and therefore as belonging to and incorporated with it. I do not concur in this argument ; and there being clear evidence of this property having been devoted to the establishment and maintenance of a particular charity, which was entrusted to the care of the Hospital of *St. Cross*, of which certainly few traces remain, except the large possessions and the title of it, although the mode of effecting it laid down by the founder is lost, it is, in my opinion, incumbent on this Court to settle a scheme for

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the future application of it. But even if I concurred with the argument, and considered this Alunshouse of *Noble Poverty* as a mere supplemental endowment of the original charity, I should, for the reasons I have already stated, be of opinion that the defence resisting the intervention of this Court would fail.

In reviewing this case, I find it impossible not again to notice the singularity, that in 1372, two hundred years after the charity was established, the master endeavoured to convert it to his own use and failed; that in 1576, two hundred years later, the master again attempted the same course, and was defeated by the statute of the 18 *Eliz.*; that one hundred and twenty years later, in 1696, the master again attempted the same course, with greater success than had attended the previous attempts, and succeeded in diverting the charity property from its legitimate purpose for one hundred and fifty years. I shall now endeavour to make a decree, which shall, as plainly as I can, but not more plainly than has been already done, state the charitable nature of this foundation; but looking at the pertinacious attempts, so often repeated and apparently with increasing success, I cannot but foresee the possibility, that some century or two hence, my decree may be produced and become the subject of comment also, in the endeavour to defeat a fourth attempt by the superintendent of this charity to pervert its revenues to his own use.

There must, therefore, be a declaration, in accordance with the prayer of the information; an injunction to restrain the future granting of leases on fines; a reference to inquire what, if any, steps should be taken in reference to these leases now in existence, but originally granted on fines, and a scheme to settle the charities.

With

With respect to the decree against the Earl of *Guildford*, personally, the Attorney-General said, that he would leave that matter in the hands of the Court. The Court, however, cannot go, in this respect, beyond the prayer of the information; and as the information does not ask for any account prior to the filing of the information, and as, undoubtedly, the master had, when appointed, a custom of above one hundred years to rely upon, although in my opinion that custom originated in fraud or wilful blindness, I shall not charge him with the rents and profits received prior to the filing of the information. But from the date of the information he must account for the rents received, and he must also be answerable for keeping the buildings in a proper state of repair, which was, according to his own contention, the *Consuetudinarium*, a duty which fell upon the revenues of the charity, out of the master's residue. Neither shall I make him pay the costs of the information; of course, taking the view I do, I cannot give him or the other Defendants any costs. The informant will have his costs out of the charity, but no costs to any of the Defendants.

Reserve further considerations and subsequent costs.

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*Re* The NEWCASTLE, SHIELDS and SUNDERLAND Union Bank, and in the Matter of the Winding-up Acts, 1848, 1849.

January 31.

A company may be wound up in chambers under the acts 1848 and 1849, instead of by the Master.

THIS was a petition of *J. Feather*, a contributory, to have this banking company wound up. A question was raised, whether the reference must not necessarily be made to the Master, under "The Masters in Chancery Abolition Act" (*a*), which prohibits future references being made to the Master, "except in matters arising under the Joint Stock Companies' Winding-up Acts, 1848 and 1849."

Mr. *R. Palmer* and Mr. *J. H. Palmer*, in support of the petition, asked that the reference might be made to Judges' Chambers.

Mr. *Elmsley* and Mr. *Selwyn*, for the Directors.

The MASTER of the ROLLS considered, that it was not imperative on the Court to make such references to the Master, and he said he would refer the matter to his own chambers, where it would be more immediately under his own control. He accordingly ordered "that the *Newcastle - upon - Tyne, Shields and Sunderland Union Joint Stock Banking Company* should be absolutely dissolved, as from the 31st of *January*, 1853, and wound up by the Judge of the court to whom this matter was attached, under the provision of the Joint Stock

(*a*) 15 & 16 *Vict.* c. 80, s. 10.

Stock Companies' Winding-up Acts, 1848 and 1849; and that in winding up the same, regard should be had to the manner in which the business of the said company had been conducted since the meeting of the shareholders of the said company on the 29th day of *October*, 1847."\*

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\* *Reg. Lib.* 1852 B, fol. 302. The like order was made in the *Newcastle-upon-Tyne, &c. Marine Insurance Company, Reg. Lib.* 1853, fol. 302.

LONG v. WATKINSON.

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*Feb.* 19, 20.

THE testator by his will, dated in 1848, directed his executors to pay the residue and remainder of his estate and effects to his sister, Mrs. *Mary Fowler*, and proceeded:—"But, in case of my said sister's death, my instructions are then to pay over all the residue and remainder of my estate and effects to *the executors or executrixes* which my said sister, Mrs. *Mary Fowler*, may appoint."

Where a bequest is made by *A.* to the executors of *B.*, such executors hold it in trust, and to be administered as part of *B.*'s assets. The persons who take it beneficially take as *cestuis que trust* and not as *personæ designatæ*, and it may belong either to the creditors, or the pecuniary or residuary legatee or next of kin of *B.*, according to the circumstances.

Mrs. *Mary Fowler* died on the 1st of *January*, 1849, leaving *Mary Long* her sole executrix, and *Isabella Watkinson* her sole residuary legatee.

The testator died on the 25th of *January* following.

The questions were, first, whether *Mary Long*, the executrix, took the testator's residuary estate beneficially; and if not, then, secondly, whether she held it in trust for the next of kin, or for the residuary legatee of the testatrix.

*Evans v. Charles*, 1 *Anst.* 128, is not law, and *Palin v. Hill* cannot be reconciled with the subsequent authorities.

Mr.

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Mr. *Kenyon S. Parker* and Mr. *Shebbeare*, for the Plaintiff, the executrix, contended she took beneficially, and distinguished this from those cases in which the word "administrator" was added. They cited 1 *Roper on Legacies* (a); *Evans v. Charles* (b); *Bridge v. Abbot* (c); *Price v. Strange* (d); *Sanders v. Franks* (e); *Palin v. Hills* (f); *Nurse v. Oldmeadow* (g); *Wallis v. Taylor* (h); *Long v. Blackall* (i); *Hinchliffe v. Westwood* (k); *Holloway v. Holloway* (l); *Daniel v. Dudley* (m).

Mr. *Lloyd* and Mr. *Hardy*, for the residuary legatee of Mrs. *Mary Fowler*, contended, that she took the residuary estate of the testator as part of the assets of *Mary Fowler*. They cited *Grafftey v. Humpage* (n); *Bulmer v. Jay* (o); *Morris v. Howes* (p); *Sibley v. Cook* (q); *Collier v. Squire* (r); *Stocks v. Dodsley* (s); *Holloway v. Clarkson* (t); *Allen v. Thorp* (u); *Smith v. Dudley* (x); *Saberton v. Skeels* (y); *Attorney-General v. Malkin* (z).

Mr. *Lee*, Mr. *Eddis*, Mr. *R. Palmer*, and Mr. *W. M. James*, for the next of kin of Mrs. *Mary Fowler*, claimed the fund. They argued as follows:—

The executrix takes the property by force of the  
 direction

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|-------------------------------------|---------------------------------------------------|
| (a) Page 113.                       | (n) 1 <i>Beav.</i> 46.                            |
| (b) 1 <i>Anst.</i> 128.             | (o) 3 <i>Myl. &amp; K.</i> 197; 4 <i>Sim.</i> 48. |
| (c) 3 <i>Bro. C. C.</i> 224.        | (p) 4 <i>Hare</i> , 599.                          |
| (d) 6 <i>Madd.</i> 159.             | (q) 3 <i>Atk.</i> 572.                            |
| (e) 2 <i>Madd.</i> 147.             | (r) 3 <i>Russ.</i> 467.                           |
| (f) 1 <i>Myl. &amp; K.</i> 470.     | (s) 1 <i>Keen</i> , 325.                          |
| (g) 5 <i>L. J. (N. S.) Ch.</i> 300. | (t) 2 <i>Hare</i> , 521.                          |
| (h) 8 <i>Sim.</i> 241.              | (u) 7 <i>Beav.</i> 72.                            |
| (i) 3 <i>Ves.</i> 486.              | (x) 9 <i>Sim.</i> 125.                            |
| (k) 2 <i>De G. &amp; S.</i> 216.    | (y) 1 <i>Russ. &amp; M.</i> 587.                  |
| (l) 5 <i>Ves.</i> 399.              | (z) 2 <i>Phill.</i> 64.                           |
| (m) 1 <i>Phill.</i> 1.              |                                                   |

direction to pay it to her, and the only question is, what is the nature of the trust on which she is to hold it? To entitle the residuary legatee, she must establish one of two things, either, that she is the *persona designata*, or that the testator's residuary estate formed part of the property which passed by the will of *Mary Fowler* at her death. Neither of these can be established, and the next of kin are therefore entitled. They cited *Ripley v. Waterworth* (a); *Jennings v. Gallimore* (b); *Long v. Blackall* (c); 11 Geo. 4 & 1 Will. 4, c. 40; *Holloway v. Holloway* (d); *The Attorney-General v. Malkin* (e); *Cotton v. Cotton* (f); *Wallis v. Taylor* (g); *Easum v. Appleford* (h); *Wilkinson v. Garrett* (i); *Daniel v. Dudley* (k).

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I am of opinion, that the executrix takes as a trustee, and not beneficially. *Evans v. Charles* (l) is not consistent with this view; but that case, after having been long doubted, has been finally overruled by several recent authorities, and is no longer considered law.

The question then remains, on what trusts does the executrix of *Mrs. Fowler* hold the property? I think she holds it to be administered by her according to the trusts of her office, that is, I consider it as forming a part of the property which came to her hands as the executrix of *Mrs. Fowler*, and that it is to be administered by her as if it formed part of the property of  
 Mrs.

(a) 7 Ves. 452.  
 (b) 3 Ves. 146.  
 (c) 3 Ves. 486.  
 (d) 5 Ves. 399.  
 (e) 2 Phill. 64.  
 (f) 2 Beav. 67.

(g) 8 Sim. 241.  
 (h) 5 Myl. & Cr. 56; 10 Sim. 274.  
 (i) 2 Coll. 643.  
 (k) 1 Phill. 1; 11 Sim. 163.  
 (l) 1 Anst. 128.

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Mrs. *Fowler*. It is the same as if the testator had said, "let the residue of my estate be administered in the same manner and upon the same trusts, as if it formed a part of my sister's estate." The result is, that, in my opinion, the contest, whether the residuary legatee or the next of kin take the property, is, in many cases, a contest arising from a misapprehension of the character in which the executor or executrix takes the property. The executor or executrix, who takes the property, does so as a trustee, and the person who takes the property beneficially takes it as a *cestui que trust*, and not as a *persona designata*. It is, in my opinion, inaccurate to lay down as a rule, that, in such cases, the fund belongs either to the residuary legatee or to the next of kin; it belongs to the persons who are interested in the estate of the person to whose executor it is given. This disposition therefore will, in some cases, give the fund to the creditors, in others to the pecuniary legatees, in others to the residuary legatees, and in others to the next of kin. This view of the case, which is the only rational one in my opinion, goes far towards reconciling all the authorities.

It is said I am concluded by authority, and that this case cannot be distinguished from *Palin v. Hills* (a); but I cannot reconcile that case with the later authorities, such as *Daniel v. Dudley*; *The Attorney-General v. Malkin*; *Allen v. Thorp*; and *Holloway v. Clarkson*, by which I am concluded. I must therefore hold, that the testator has directed his residuary estate to go to the executrix of his sister, to be administered by her as part of her estate; and that after payment of her debts and legacies, it will belong to her residuary legatee.

(a) 1 *Myl. & K.* 470.

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NOTE.—See *Re Mainwaring*, V. C. Parker, 24th July, 1852, MS.; *Meryon v. Collett*, 8 *Beav.* 386; 2 *Spence's Eq. Jur.* 536.

1852.

November 24.

1853.

April 18.

July 12.

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**T**HIS was a petition by a gentleman, who had formerly been a solicitor of this Court, praying that **his** name might be restored to the roll of solicitors, from **which** it had been struck off in *December*, 1842, on **an** account of professional misconduct, at the instance of **the** Law Society of *Birmingham*, under the following **circumstances** :

In 1840, *Powell* had become bankrupt, and *Baker*, **his** sole assignee, employed the Petitioner as his solicitor, and committed to him the whole management of **the** business of the bankruptcy. In *December*, 1840, **at** a meeting in the bankruptcy, *Baker* rendered his accounts on oath, which had been prepared by the Petitioner, showing a balance of 234*l.* only due from him; whereupon the account was passed, and the amount divided as a final dividend amongst the creditors.

A solicitor who had been struck off the roll for misconduct, restored, after a lapse of ten years, during which, amidst great privation and suffering, he had maintained an irreproachable character, the application being supported by a memorial signed by a very large number of solicitors and not opposed by the Law Institution, though opposed by one individual solicitor only.

It afterwards transpired, that the account was incorrect in several particulars, various sums received by the Petitioner not having been accounted for. After further investigation, the assignee was charged with the amount, together with 20*l.* per cent. on all monies in his hands; this amounted together to 184*l.*, and was paid by the Petitioner. An application was made to this Court, in 1842, by the President of the Law Society of *Birmingham*, to strike the Petitioner off the rolls, when he attempted to explain his conduct, by saying it arose from error and mistake, and had been caused by the irregular manner in which his accounts had been kept, and the haste

in

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in which the accounts in question had been prepared for him. He had throughout evinced his anxiety to have the matter inquired into and set right, and had done so in his power by himself paying the balance, which had been divided amongst the bankrupt's creditors. At the hearing, Lord *Langdale* was not satisfied with the explanation, and directed his name to be struck off the rolls.

After this the Petitioner, in *April*, 1843, went to the United States, for purpose of practising as an attorney and solicitor there, and passed the usual examination, but finding he could not practise until he had resided there for three years, and having no other means of procuring a livelihood for himself and family, he, suffering much distress and privation, returned to England, in *September*, 1844. After staying with his friends for some time, and suffering a great domestic affliction, he, in *April*, 1845, commenced the business of a stockbroker, in *Manchester*, which he carried on for a considerable time with great success, and was elected to the office of chairman to the Stock and Share Exchange in *Manchester*, an office of a very responsible and influential nature, and in which large sums of money were constantly passing through his hands. In *February*, 1846, however, some persons circulated rumours to the effect that he was under the influence of the order of 1842, and he resigned his office. At that time, his business diminished to such an extent that he was compelled to abandon it, and he was left without any adequate means of supporting himself and family.

In 1847, he presented a petition, praying to be restored to the roll. This petition was heard by Lord *Langdale*, who however died without having delivered any judgment. The Petitioner became the man

clerk of Messrs. *S. and J.*, of *Birmingham*, solicitors, in whose service he had continued. The committee of the Law Society in *Birmingham*, upon due consideration of his case, came to the determination not to oppose the petition, which was supported by the affidavits of a justice of peace, a banker, and the incumbent of *St. Mary's, Birmingham*, as to his honourable and upright conduct, together with a memorial, signed by eighty-six solicitors and attornies, practising in *Birmingham*, including the town clerk, the clerk of the peace, and the deputy clerk of the peace, stating the high opinion entertained by them of his honourable and upright conduct, and expressing a hope that the Court would take the circumstances into its gracious consideration, and order the name to be restored. When the petition came on, upon the 24th of *November*, 1852, it was directed that the usual notice for admission should be given, but the Law Institution in *London* did not oppose this application.

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Mr. *R. Palmer* and Mr. *Selwyn*, in support of the petition, argued, that after so great a lapse of time, and considering the many and severe trials and sufferings the Petitioner had undergone, the Court might mercifully consider that a sufficient punishment had been inflicted on the Petitioner, and exercise its jurisdiction in restoring his name to the roll. They referred to the case of *In re Smith*, before Lord *St. Leonards*, in which the name of Mr. *Smith*, after having been struck off the roll, for some irregularity in practice as Master extraordinary, was ordered to be restored, but with a proviso that he should be suspended from practising for six months. They also referred to *Rex v. Greenwood* (a), where *Greenwood*, an attorney, about two years previously,

(a) 1 *W. Black.* 222.

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viously, had been struck off the roll for malpractice, "and was now, upon humble petition and motion, readmitted; the Court declaring, that the striking off the roll was not to be understood as a perpetual disability, but was sometimes only meant as a punishment, and might be considered in the light of a suspension only, if the Court saw cause."

Mr. *Sidney Smith*, for a solicitor of *Birmingham*, opposed the application.

*The MASTER of the ROLLS* reserved judgment.

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July 12.

*The MASTER of the ROLLS.*

I have considered this case, and I have determined to restore this gentleman to the roll. Though he was very properly struck off, yet considering the great length of time that has elapsed, and the great suffering that he has endured by reason of the order, considering the testimonials to his good behaviour and conduct, and that the application is supported by so many solicitors of *Birmingham*, who have certified to that effect, and the absence of any opposition on behalf of that most useful and intelligent body in *London*, *The Law Institution*, I have come to the conclusion, that I shall best act by restoring this gentleman to the roll of solicitors.

I sincerely hope, that the severe lesson he has received will have the effect of making him act, for the future, with perfect straightforwardness and strict integrity in all his dealings; I therefore restore him to the roll, and an order may be made accordingly.

1853

## BARTLETT v. HARTON.

THE bill was filed on the 25th of *August*, 1845, against three Defendants, and on the 14th of *July*, 1853, a motion being made to dismiss for want of prosecution, it was ordered, that the Plaintiffs should, within one week, set down their cause for hearing, and serve a *subpœna* to hear judgment; or in default thereof, that the bill should stand dismissed with costs, as against the Defendants, *George Harton* and *William Henry Harton*.

On the 19th *July*, 1853, the Plaintiffs set down the cause for hearing, and issued a *subpœna* to hear judgment, returnable on the 2nd *November*, but did not serve it on the Defendants till the 9th *September*. On the 10th *September*, the Defendants' solicitor informed the Plaintiffs' solicitor that he intended to treat the suit as dismissed, and would insist on the benefit of the order of the 14th *July*; and, on the 29th *October*, took out warrants to tax the costs of the suit. The Plaintiffs now moved to stay the taxation, except as regarded the costs of the motion made by the Defendants on the 14th *July*, 1853. The solicitor of the Plaintiffs, by his affidavit stated, that no copy of the order of the 14th *July*, which was drawn up, had ever been served on him; and his managing clerk swore, that he was not aware it was necessary to serve the *subpœnas* within the week limited by the order, and that the omission to do so was by mistake.

Mr. *Roupell* and Mr. *Drewry*, for the motion. The

*November* 4.

A suit stood dismissed for want of prosecution, in consequence of the Plaintiff not serving a *subpœna* to hear judgment within the time limited by an order to speed. The Plaintiff moved to stay the taxation of the costs of suit. Held, that the motion ought to have been to restore the bill; and that although the Court would feel inclined to grant indulgence, in the case of a *bonâ fide* mistake, yet that it was not to be extended to such an extent as to encourage parties in proceeding negligently with their suits.

Ignorance of the practice held to be no sufficient ground for restoring the suit, nor the fact that the long vacation had intervened.

order

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order of the 14th *July* has been substantially complied with, and the omission to serve the *subpœna* within the week arose entirely from ignorance as to the practice, on the part of the solicitor's clerk. The affidavits show that it was owing to a mistake, and not with an intention to delay the proceedings, that the *subpœna* was not served. The usual course of practice is to serve the *subpœnas* in not less than ten days before the return day of hearing, and in this case, they were served a considerable time before. The omission to serve them within the week, as prescribed by the order, being entirely a slip from inadvertence, and as the Plaintiffs have not been damnified by the delay, the Court will extend some indulgence, and stop the taxation.

Mr. *R. Palmer* and Mr. *Ellis*, for the Defendant *William Henry Harton*. The motion is equivalent to asking the Court to restore the suit which is now gone, an order which the Court very sparingly makes. No case has been made for any such indulgence as is asked. The bill was filed so long ago as 1845; there has been gross negligence in the prosecution of the suit, and the express object of the order, in limiting the time to a week, was to compel the Plaintiff to bring his cause to a hearing. This order was made under the 114th Order of *May*, 1845, art. 4, and the serving of the *subpœnas* is just as necessary in the case of such an order as the setting down the cause; *La Mert v. Stanhope* (a). Ignorance, in a case like this, is no excuse, nor any ground for indulgence, which the Court will not grant, unless under very special circumstances; *Hannam v. The South London Waterworks Company* (b); in which case, the Court laid down the

(a) 5 *De G. & Sm.* 247.

(b) 2 *Meriv.* 61.

the principle upon which it acts in restoring suits. In *Matthews v. Chichester* (a), a slip in not setting down a demurrer in proper time was not excused. They also cited *Cooke v. Davies* (b).

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Mr. Cole, for the Defendant *George Harton*.

Mr. Roupell, in reply.

*The MASTER of the ROLLS.*

When this case was opened, I was struck with the singularity of the form of the motion, which asks, that the Defendant may be absolutely restrained from taxing the costs of the suit under the order of *July* last, instead of only seeking to stay the taxation until he could move the Court to restore the suit, which is gone by that order. But although the Plaintiffs knew, as early as the 10th of *September*, that the Defendants insisted on treating the suit as dismissed, they took no steps to restore it till *November*. If they had now come here upon a motion with that object, and had made out a case for indulgence, on the ground of a *bonâ fide* mistake, I should have been unwilling to destroy the suit by standing on the strict practice; but, at the same time, indulgence is not to be extended to such an extent, as to form a precedent which would encourage parties to proceed with a suit as negligently as they might think fit.

The Plaintiffs say, that no inconvenience has resulted or can result from their slip, but it is a great and serious inconvenience to a Defendant to have a suit hanging over

(a) 11 Jur. 49, reversing 5 Hare, 207. (b) Turn. & Russ. 310.

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over his head for a great length of time, in consequence of the delay of the Plaintiff in its prosecution. If the motion had been properly framed, I might have been inclined to restrain the taxation of the costs of the suit until the next seal, to enable the Plaintiffs to take such course as they might be advised. But the Plaintiffs make no case for indulgence, although they must have expected that the Defendants would oppose any application to take from them the benefit of the order. They make no case which, on a proper motion for that object, would have induced me to order the suit to be restored, and I must therefore dismiss the motion with costs; indeed, the Plaintiffs must have paid all the costs, if the motion had been granted.

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WALKER v. DRURY.

November 5.

Three-fourths of a legacy of 400*l.* belonging to a wife (after payment of the cost) settled as against a particular assignee of the fund, the husband having nine years before become bankrupt; and *semble*, that the whole would have been settled but for negotiations between the parties for several years, which had involved the assignee in considerable expenses.

A TESTATOR devised a house, &c. to his widow for life, with remainder to his son *Robert*, in fee, charged with the payment of 400*l.* to his daughter *Ann*.

The testator died in 1818, and, in 1825, the daughter married *Joseph Walker*, on which occasion a settlement was made of some furniture of small value, the property of *Joseph Walker*, but no other settlement was ever made.

In 1838, *Joseph Walker* and *Ann* his wife, in consideration of 499*l.* (stated to be then due and owing from *Joseph Walker* to *Wm. Walker*), assigned the legacy of 400*l.* absolutely to *Wm. Walker*, and he, in 1838, mortgaged it to *Thos. Windley*.

In

In 1839, a fiat in bankruptcy was issued against *Wm. Walker*. The testator's widow died in 1848. The legacy to Mrs. *Walker* then became payable, and *Wm. Walker's* assignees claimed to be entitled to it; and, after a good deal of correspondence and considerable delay, Mrs. *Walker*, on the 21st *June*, 1853, filed her claim, stating the above matters, and that there were then seven children of her marriage, the eldest of whom was twenty-six and the youngest five years of age; that *Joseph Walker* was an accountant, earning about 2*l.* 10*s.* per week, and was not possessed of any property, and was unable properly to maintain the Plaintiff and her children, and that the Plaintiff was not interested in any other property: and she claimed to be declared to be entitled in equity to have the 400*l.* settled upon her and her issue.

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Mr. *Roupell* and Mr. *Martindale*, for the Plaintiff,  
 cited *Marshall v. Fowler* (a)

Mr. *R. Palmer* and Mr. *Metcalf*, for the assignees of *Wm. Walker*. The principle upon which the jurisdiction of this Court is based in such cases is, that the husband has duties to perform to support his wife and family; and, in consideration of their performance, he becomes entitled to all the benefits that flow from his marital right, but if he deserts or neglects her or by insolvency is unable to support his family, the Court will not assist him in recovering his wife's property. But where there is no evidence to show, that the husband has squandered his wife's fortune, or that he is not likely to support her, the case is not one for depriving him or his assignees of every species of interest in it.

The

(a) 16 *Beav.* 249.

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The assignees of *Wm. Walker* are therefore entitled to a reasonable share of the legacy.

Mr. *Roxburgh*, for *Windley*, the mortgagee, contended, that there was no ground for the Plaintiff's claim, as her husband was quite able to support and did support her. *Dunkley v. Dunkley (a)* was also cited.

*The MASTER of the ROLLS.*

The principle upon which the Court proceeds in such cases is not to look solely to the conduct of the husband, but to what is beneficial for the wife and family; and if this application had been made to me immediately after the fund fell into possession, I should have had no difficulty in settling the whole of it. But for several years, negotiations have been carried on respecting the matter, involving considerable expenses, on the part of persons who might reasonably assume, that some provision would be made for the satisfaction of their claims; and concurring in the view, that the Court looks at the peculiar circumstances of each case, I think that the proper order will be, to direct the costs of all parties to be taxed and paid out of the fund, and then direct 300*l.* to be settled on Mrs. *Walker* and her children, and the residue of the fund to be paid to the mortgagee. No formal settlement is necessary, for the fund being small, the terms of the settlement may be stated in the order (*b*).

(a) 2 *De G. M. & G.* 390.

(b) See *Watson v. Marshall*, *antè*, p. 365.

1853.

## FORD v. RACKHAM.

PRIOR to 1848, Mr. *S. W. Lane Fox*, being tenant for life of considerable real and personal estate, had granted annuities and incumbered his life estate to various persons.

Proceedings having been taken in Chancery, an indenture, dated the 3rd of *April*, 1848, was executed, which was made between *S. W. Lane Fox*, of the first part, these incumbrancers of the second to the ninth parts, and Mr. *Rackham* of the tenth part, by which, after reciting an agreement between the parties to appoint *Rackham* receiver of the rents and profits, Mr. *S. W. Lane Fox*, with the concurrence of these incumbrancers, appointed *Rackham* such receiver; and it was thereby agreed between all the parties thereto, that *Rackham* should keep down the incumbrances, according to their priorities, and pay the surplus to Mr. *S. W. Lane Fox*. Mr. *Rackham* covenanted with Mr. *S. W. Lane Fox*, and also the several incumbrancers, so to apply the income; and Mr. *S. W. Lane Fox* covenanted with the incumbrancers, that he would not, without their consent, revoke the powers and authorities given to Mr. *Rackham*. And it was declared, that the incumbrancers should not be deemed incumbrancers in possession, or charged with the misapplication of the rents.

Afterwards, in 1849 and 1852, Mr. *S. W. Lane Fox* mortgaged his life estate to the Plaintiff Mr. *Ford*, subject to the prior incumbrances.

In 1852, the Plaintiff filed this bill against *Rackham*,  
Mr.

*November 8.*  
Where *A.* and his incumbrancers, *B.*, *C.* and *D.*, joined in the appointment of a receiver, who covenanted to keep down the incumbrances, according to their priorities, and pay the surplus to *A.* Held, that a subsequent mortgagee from *A.* could not sustain a bill against the receiver and *A.* for an account of the rents and an injunction against paying the surplus to *A.* in the absence of *B.*, *C.* and *D.*

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Mr. *S. W. Lane Fox*, and a subsequent incumbrancer alone, stating the circumstances, and that *Rackham*, notwithstanding the Plaintiff's applications, persisted in paying over the surplus to Mr. *Lane Fox*, without regard to the Plaintiff's claims, and that none of the parties entitled in priority of Mr. *S. W. Lane Fox* were willing to interfere with the receipt of the rents and profits, and declined to interfere or revoke the appointment of the receiver.

The bill prayed an injunction to restrain *Rackham* from paying any of the rents and profits to Mr. *Lane Fox*, and that he might pay into Court the clear residue, which, under the receivership deed, would be payable to Mr. *Lane Fox*, that an account might be taken of what was due to the Plaintiff, and proper directions for foreclosure or sale might be given.

Mr. *Rackham*, by his answer, stated, that, in consequence of difficulties, all payments of income had been suspended.

Mr. *Willcock* and Mr. *Southgate*, for the Plaintiff. The prior incumbrancers are not necessary parties, for the Plaintiff only seeks to deal with the surplus after they have been satisfied, and he cannot redeem them, as they are principally annuitants. *Rackham* has properly been made a Defendant, for the sake of an injunction, to restrain him paying over such surplus to the mortgagor; this he has no right to do, after notice of the Plaintiff's securities, by which Mr. *S. W. Lane Fox's* interest in the surplus has been transferred to him. The Plaintiff cannot take possession, but *Rackham* is bound by notice of his rights; *Page v. Broom* (a); *Tulk v. Moxhay* (b).

Mr.

(a) 4 *Russ.* 6.

(b) 2 *Phill.* 774.

Mr. *R. Palmer* and Mr. *G. L. Russell*, *contrà*. Mr. *Rackham* has improperly been made a party to the suit. He is not an incumbrancer, but a mere agent. If he is the agent of the prior incumbrancers, then they are liable for his receipts, but he cannot be called upon to account in their absence. He has covenanted with them as to the application of the income; and if an account is to be taken of his receipts and payments, it must be taken once for all, and in the presence of all persons interested, so that he may be finally and for ever released. As to limiting the account to the surplus, that is impossible, for the surplus can only be ascertained by taking the whole account. They cited *Shaw v. Lawless*(a).

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Mr. *Willcock*, in reply.

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*The MASTER of the ROLLS.*

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I entertain no doubt, that the owner of an estate may enter into such an arrangement or contract with a steward or other person to receive the rents of his property, which will be binding not only on the owner but on any person to whom the owner may afterwards convey that property, with notice of the contract. There may be an equitable right in favour of the steward, binding, not only on the owner but also the person to whom he may afterwards convey the property. If Mr. *Lane Fox* had appointed Mr. *Rackham* the receiver under such a contract, and had directed him to make certain payments out of the income to various other persons, his receipts would then be a mere matter of account between him and Mr. *Lane Fox*, or the person to whom Mr. *Lane Fox*

(a) 5 Cl. & Fin. 129.

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*Fox* might afterwards convey the property. I am also of opinion, that a fiduciary relation would exist between Mr. *Rackham* and the person to whom Mr. *Lane Fox* so conveyed the property; and who, in order to ascertain the surplus, would be entitled to an account of his management of the property; but the persons to whom Mr. *Lane Fox* had directed payments to be made would have no right to such an account. The present, however, is a different case, because it appears that Mr. *Rackham* was appointed receiver by a contract, made not only between him and Mr. *Lane Fox*, but between him and various other persons, with whom, individually and severally, Mr. *Rackham* contracted to make certain payments. The question then is, whether Mr. *Ford* can question the manner in which Mr. *Rackham* has performed his duties, so far only as relates to the interest of Mr. *Lane Fox* himself, and as claiming under him. I am of opinion that he cannot. It was suggested, that so long as the annuitants are paid in full, they can raise no question, and can claim no right whatever; but this Court cannot deal with a case on the assumption of what may turn out to be the result on taking an account, of which I can know nothing at present, and it is obvious, that the income may fall short, and be insufficient to pay all the annuitants in full. Mr. *Rackham* is entitled to say, "I am not to be vexed with a double account; the surplus may on one occasion be very small, and in the next year there may be no surplus at all, but a deficiency; and I have not been able to pay the annuitants in full." The last annuitants may say, that if the account had been properly taken, there would be no surplus to pay Mr. *Lane Fox*, or Mr. *Ford* claiming under him, but sufficient to pay all the annuitants in full; the account would then have to be taken over again.

It

It therefore appears to me, that Mr. *Rackham* stands in a fiduciary relation, not to Mr. *Lane Fox* alone (in which case I should have been of opinion that such relation had been transferred to Mr. *Ford*, so as to entitle him to call upon Mr. *Rackham* to show that he had duly performed that which he had covenanted to perform, and to account for the surplus after making certain payments only); but it is a contract between him and all those annuitants who were parties to the deed, and by which contract he is made a receiver of the property, and covenants to pay them. The distinction is plain and obvious. If Mr. *Fox* had appointed Mr. *Rackham* his receiver, and said, "Pay me the surplus, after paying annuities to A., B. and C.," Mr. *Fox* would have been the only person to whom Mr. *Rackham* would have had to account; and the annuitants, if they had not been paid in full, would have been left to their own remedies; but the moment he is appointed by a contract with all the annuitants, as well as with Mr. *Lane Fox*, he becomes the agent for them all, and none of them could make him account without having the other annuitants present, in order that that account might be properly and substantially taken, once for all. Therefore, although I am of opinion that the bill can be maintained against Mr. *Rackham*, yet I think that it is defective by reason of the other parties to the deed not being made parties; and I shall give leave to amend by adding parties.

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Mr. *Willcock* asked that they might be summoned in chambers, but the Court having said, that this could not be done, as they might insist on being redeemed, Mr. *Willcock* agreed, that Mr. *Rackham* should be dismissed with costs, and the common foreclosure decree was then made.

1853.



## WELLS v. WELLS.

November 9.

A testator gave the income of his property to *F.* and two other persons successively for life, and on the death of the survivor, he gave all his property to the eldest son then living of *W.*, his executors, administrators and assigns. *W.* had three sons, of whom *W. W.* was the eldest. The testator, by a codicil, revoked so much of his will as related to *W. W.*, "and left *F.*, on the death of the tenants for life, in the full enjoyment of all his property." Held, that the gift to *F.* in the codicil enlarged his life estate into absolute ownership, and being inconsistent with the gift to the eldest son of *W.*, revoked it, whether the revocation of the gift to *W. W.* operated as a revocation of the gift to the "eldest son of *W.*" or not.

THE testator, *Henry Wells*, gave all his property to his wife and brother, *John*, successively, for life; and on the death of the survivor, he gave "the use, interest, income and enjoyment of all his property" to his brother *Frederick Octavius* for life, and on the decease of the survivor he gave all his property "to the eldest son then living of his late brother Captain *William Wells*, and to his executors, administrators and assigns absolutely."

Captain *William Wells* had an eldest son, *William Wells*, and two other sons, *Grencille* and *Frederick*.

In 1840, the testator made a codicil as follows:—"I revoke so much of my will as relates to my nephew *William Wells*, Esq., of *Holme*, and I leave my brother *Frederick*, (on the death of my wife and my brother *John*,) in full enjoyment of all my property, hoping that he will bring up each of his children in liberal principles."

The testator died in 1840, and the three sons of Captain *William Wells* were then living. *Frederick Octavius Wells* died in 1848, when the two younger sons of Captain *William Wells* insisted, that the codicil did not revoke the gift as regarded them, in case either of them survived the widow and *John Wells*. On the other hand,

hand, the representatives of *Frederick Octavius* contended, that the codicil entirely revoked the gift in favour of the other sons of Captain *William Wells* and substituted *Frederick Octavius Wells* as the testator's general residuary legatee. A bill was filed to obtain the opinion of the Court as to the proper construction of the will and codicil.

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Mr. *Lloyd* and Mr. *Grenside*, for the Plaintiff. The testator, by the codicil, revoked the entire gift to the "eldest son" of his brother, Captain *William Wells*, living at the death of the survivor of the three tenants for life, and introduced, by way of substitution, his brother *Frederick Octavius Wells*, as residuary legatee, and gave him the "full enjoyment of all his property." It appears from the first clause of the sentence, that the testator, having in his mind the state of his brother *William's* family, as it then existed, assumed, that his nephew *William*, the then eldest son of Captain *Wells*, represented that entire class, the eldest of whom, living at the death of the survivor of the tenants for life, was to take, and that a revocation of the bequest as to him was a revocation as to the entire class, for *William* took no interest, except as eldest son. No other construction will render the codicil intelligible. If, however, the first clause of the codicil should not be held to operate as a direct revocation of the gift in the will, still the subsequent words amount to an absolute gift to *Frederick Octavius*, which being inconsistent with the bequest to the eldest nephew, contained in the will, therefore revokes it. Now the words amount to a gift to the testator's brother *Frederick* of something additional; and the words, "full enjoyment," must therefore confer on him the absolute ownership of the property in lieu of a mere life estate, and be held to enlarge the gift of the income into a gift of the *corpus* itself. They cannot

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cannot be meant to guard against any disturbance to the life estate, which might be produced by the revocation, by the codicil, of a subsequent gift with which the life estate was in no way connected. The gift, therefore, to the eldest of *William's* sons is completely revoked, and that to *Frederick* enlarged into an absolute ownership.

Mr. *Beaumont*, for the trustees and next of kin.

Mr. *R. Palmer* and Mr. *Hobhouse*, for the Defendants *Grenville Granville Wells* and *Frederick Fortescue Wells*. A clear and distinct gift by will cannot be revoked by general and uncertain words in a codicil; *Doe d. Hearle v. Hicks* (a). There is no question here as to the estates the different persons take, but to what extent the revocation operates. This is not a gift to any particular son, but to one of a class, to be ascertained at a future period; that is, to an eldest son, to be ascertained at the death of the survivor of the three tenants for life. The words are:—"To the eldest son then living of Captain *William Wells*, and to *his executors, administrators and assigns absolutely*." But the revocation only relates to *William*, a particular individual of that class, as to whom there might either have been some change in the testator's feelings, or in his circumstances, which rendered it no longer expedient to make him the object of his bounty. The individual was excluded from taking as the eldest of a class, but omitting him, the gift remained undisturbed, and to be construed as if he were merely excluded from that class. Had the words of the codicil been simply, "I revoke so much of my will as relates to my nephew *William Wells*," no doubt could have existed,

(a) 8 Bing. 475; 1 M. & Sc. 759; 1 Y. & Jer. 470.

existed, that the testator intended to affect him only; and why should the subsequent words alter the construction? It is said, that they are inconsistent with the gift in the will to the eldest son of *William*; but this is by no means clear, for the words, "I leave my brother *Frederick*," &c., were added merely to confirm the gift, and to leave "his brother *Frederick* in the undisturbed possession" of what had already been given him by the will. The words "full enjoyment" are equivalent to "undisturbed enjoyment," and do not operate to enlarge the life estate. The testator may have supposed, without seeing the will, that the revocation of the gift to *William Wells* interfered in some way with that to his brother *Frederick*, and therefore he added the confirmation of it by the codicil; at all events, the words are far too doubtful and uncertain to revoke an express gift; *Bunbury v. Bunbury* (a).

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*The MASTER of the ROLLS.*

I entertain no doubt as to the propriety of the decision in *Doe d. Hearle v. Hicks*, which I have always acted upon. The only question is, whether the words of this codicil are so sufficiently clear as to leave no doubt on the mind of the Court, that it constitutes a distinct revocation of the gift to the eldest son of Captain *William Wells* after the death of *Frederick Octavius Wells*. It has been argued; that a revocation, as regards *William Wells*, does not necessarily include the other two nephews, because, if *William Wells* should happen to die before the survivor of the three tenants for life, he would not then be the person designated by the will. But what would have been the effect of the codicil, if it had simply said, "I revoke so much of my will as relates to my nephew *William Wells* of *Holme*," omitting the

(a) 13 Jur. 1091.

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the subsequent words, and it had happened that at the death of the last tenant for life, *William Wells* had been the surviving son? I apprehend there would have been an intestacy, because no one but *William Wells* could take under the designation in the will, and as to him the will was distinctly revoked.

It is, however, unnecessary to speculate on what the result of that would have been, for I think that the words of the gift to *Frederick* are, by themselves, sufficient to determine the question. A gift by a codicil cannot operate as a confirmation of a bequest contained in the original will, with which it is quite inconsistent. It must operate, if at all, as a total or partial revocation.

In this will, whenever the testator intends to give a life interest, he expresses it by the words "for her life," or "for his life." By his codicil, he not only revokes "so much of the will as relates to his nephew *William Wells*," but he goes on to state, "and I leave my brother *Frederick*, on the death of my wife and my brother *John*, in full enjoyment of all my property." That, undoubtedly, is an absolute bequest to him of all his property; and cannot be read as a confirmation of the gift to him in the original will, because that was for life only, while this is absolute.

I am of opinion, that there is no serious doubt as to the construction of the codicil; for whatever might have been the testator's motives for revoking so much of the will as relates to *William Wells*, the eldest son of his brother Captain *William Wells*, he has made his intention clear by the gift to his brother *Frederick*, whereby the bequest to him for life is enlarged into an absolute interest.

I must therefore make a declaration to that effect.

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ATTORNEY-GENERAL *v.* The ARCHBISHOP  
of YORK.

November 9.

**I**N 1548, *Robert Holgate*, Archbishop of *York*, in pursuance of letters-patent granted to him by King *Henry* the Eighth, established a free school of grammar in *Hemsworth*, and a master thereof (who was to be a corporation) to teach grammar and other knowledge and learning, freely, without taking any stipend or exaction of the scholars. And he ordained, that the Archbishop of *York*, and his successors, should have the nomination and gift of the office of master of the school, and that the master should be versed in the Hebrew, Greek and Latin tongues, and should teach and inform the same to the scholars apt for the same, according to his discretion, and that he should have an usher (of whom he should have the election) and to whom he should pay 4*l.* yearly; that the master should diligently apply himself to teach grammar and other knowledge

Part of the property of a foundation school consisted of an advowson producing no income. The Court considered, that, if the parish were within a reasonable distance and the duties of it light, the living might properly be held by the master or usher, but that not being the case, the advowson was ordered to be sold for the benefit of the

charity, which the Court considered it had jurisdiction to order.

The statutes of foundation of a school (1548) directed that the rents of the charity property should not be raised above the yearly rents then payable. Held, that this direction was simply inoperative, and that the most must be made of the property.

In a school, the first object is to provide a proper remuneration for a competent master, and this ought not to be interfered with by the institution of exhibitions and scholarships, however useful in themselves.

The provisions in the statutes of foundation, as to the period of attendance of the master, may be modified by the Court in settling a scheme.

In the absence of express directions, it is not incumbent on the schoolmaster to reside in the school-house, provided he lives within a convenient distance, *semble*.

In raising costs out of charity property by a mortgage, the Court is anxious to provide for its extinction by a sinking fund.


Where the original charter of foundation of a charity does not exist, but copies of it are found in proper places, two of them purporting to be the original charter in *extenso*, and one omitting certain trusts found in the other two, the former must be acted on, though it appears that the property of the charity was afterwards diminished, and it is alleged, that in consequence thereof, the visitor, under the authority given by the original charter, may have limited the trusts as shown in the third copy.

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knowledge in the school, during the hours mentioned, commencing at six or seven o'clock in the morning, according to the season of the year, and that if the master should not pay such sums of money as therein directed, or should be remiss or negligent in teaching, &c., the office of schoolmaster should be void; and he directed, that the master should not let the lands belonging to the charity for more than twenty-one years, nor make any new lease, during the continuance of the old, nor raise the rents above *the yearly rents then paid*. And he ordained, that the master should pay 10*l.* yearly to six poor scholars, to be appointed by the parson, curate, churchwardens and four of the householders of the parish, and that he should take only such fines or leases as in the rental annexed thereto were appointed, which were to be applied to the reparation of the schoolhouse and building and the maintenance of the foundation, and the surplus to mending of the highways and relieving the poor of the parish and the poor scholars. These latter provisions, as to the 10*l.* to the poor scholars, and the application of the surplus of the fines, were not contained in the copy of the charter given to the present master on his appointment; who contended, that, if in the original charter, they were to be presumed never to have been acted on, or to have been duly and properly withdrawn from the statutes, by some alteration of the foundation, in pursuance of the power given to the archbishop as visitor by the charter, of making and altering the ordinances. The same charter established not only the school at *Hemsworth*, but two other schools, of which the archbishop was made visitor; and four copies of it were made and deposited, one with the archbishop, another with the dean and chapter, a third with the archdeacon, and a fourth with the master; but the originals did not now exist. Copies, however, were found in three of

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the prescribed repositories, two of which were complete, and nearly agreed with each other; but the third, handed down from master to master, and produced by the present master, was imperfect and apparently mutilated, the paging of the document not being continuous.

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The information prayed a declaration, that the system of letting at inadequate rents, and at fixed fines, was improper, and that an account should be taken, and a scheme settled, and that the master ought to give his daily personal attendance in the school.

The master (the Rev. *John Baines Graham*) who had been appointed in 1832, insisted, that he was not bound to reside, nor to teach anything but Hebrew, Greek and Latin, nor to attend at the school, except at reasonable hours; but he stated, that there had been few applications to him to teach the learned languages, and that he had taught reading and writing at a small charge, which he had been in the habit of making up to 1846, when it was discontinued, and an arrangement was made with the parishioners, whereby he appointed a resident assistant to teach the boys at the school the several branches of an English education gratuitously, he himself receiving, at his vicarage of *Falkirk* (two miles distant from the school) such boys as wished to learn Latin, &c., and exchanging duties with his assistant one day in each week.

The property of the school consisted, among other things, of the rectory of *Synnington*, situate at a distance of upwards of forty miles from the school, and certain property, originally conveyed to it, had been afterwards reconveyed or surrendered by the master to the archbishop; and in consequence of this diminution

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of its endowment, it was alleged, that the original trusts, as set out in the original charter, were curtailed as to their objects, and that the document produced by the master was a copy of the new charter, modified by the archbishop, so as to meet the new state of things; on this there was no evidence.

The *Solicitor-General* and Mr. *T. H. Terrell*, for the information. Though the present master, no doubt has greatly improved the system he found in operation when he was appointed, still the school is a grammar school for teaching the learned languages, and, *de facto*, the mastership has been converted into a sinecure. The master is resident at a distance of two miles from the school, and attends only once a week, though he and the usher are required, by the constitution of the school, to attend ten hours daily, under a penalty of forfeiture of office, which the present master is now liable to. A large school for poor children should be established, with exhibitions for the most deserving; the Defendant, Mr. *Graham*, must be required to elect between his living of *Falkirk* and the mastership; and, if he should choose the latter, he must live in the house, and devote his whole time to the duties of the school. A scheme should be settled, and the property let at its full value; the advowson of *Synnington* should be sold, and the proceeds applied as part of the charity funds.

Mr. *Faber*, for the archbishop of *York*.

Mr. *R. Palmer* and Mr. *G. L. Russell*, for the master. The statutes constitute the master a body corporate, and direct him to pay 4*l.* a year to the usher; and there is nothing more in his copy of the charter. The result is, that lands are given to a corporation sole, and the master is charged with a certain sum only, and there-
 fore

fore he takes the rest for himself. The instrument coming out of the master's possession is the true one, and by that he has property given to him with certain burdens, and no direction as to the rest, except that he is not to raise the rents, or take other than certain fines mentioned. The archbishop was to have power to change the constitutions, and the presumption is, that he did so, for the master surrendered part of the estate to the archbishop, and, the income having been lessened in value, the archbishop struck out the latter clauses.

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It has scarcely been disputed, and it must be inferred, that the document stated *in extenso* by the Solicitor-General was the original document published by the archbishop, the founder of this charity. But I am asked further to infer, by reason of the re-conveyance to the archbishop of a certain portion of this property, by which part of it was taken away from the charity, and in the absence of any further evidence that the other document, which is evidently in a handwriting of a much later period, and does not even purport to be complete (for the paging does not go on continuously), was the document by which the archbishop ultimately limited and stated the full extent of his intentions and objects. I cannot come to any such conclusion; I believe that the document *in extenso* contains the rules provided by the archbishop for the government of this school, and that no alteration was made in them by him. I must, therefore regulate this school according to that document, so far as the altered state, circumstances and law of the country, will allow.

In the first place, it is manifest, that the regulation respecting the non-increase of the rents and fines is con-



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dered in this Court as merely inoperative. It is wholly ineffectual, and has been frequently so held by this Court. There must, therefore, be an inquiry as to what leases there are, and whether any steps should be taken with respect to them; and the property must be placed on such a footing as will make it most productive.

Looking at this document, I find it very strict and particular, in requiring the personal superintendence, daily, of the schoolmaster. But I am not prepared to say (provided the school can be efficiently managed without that exact attendance) the Court will consider it to be of the essence of the duty of the schoolmaster, that he should actually be in the school from six o'clock in the morning to six o'clock in the evening during the summer months, and from seven o'clock in the morning to five o'clock in the evening during the winter months. That may depend on what is most for the benefit of the school; but I entertain no doubt that the personal superintendence of the master is of the greatest value to the school, and that it must be given daily, with such a reasonable allowance for vacations as may be arranged upon the settlement of a scheme. Provided that personal superintendence be given, I am not at this moment prepared to say (although that is rather a matter for consideration on the settlement of the scheme), that it is absolutely necessary that he should reside in the schoolhouse, if he resides within such a moderate distance as will enable him fully to perform those duties. But I am of opinion, that in the settlement of a scheme, the Court cannot, either on the footing of the regulations imposed by the founder, or in their absence, consider that the superintendence of the master once a week would be sufficient to satisfy those conditions. I think it is proper, therefore, that there should be a scheme to consider the mode in which

which this school should be regulated for the future, and upon that the whole matter will be open before me.

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I repeat the observation I have before made, that, in my opinion, no benefit is done to a school, by endeavouring to limit the remuneration of the school-master to such an extent, as will not secure the services of a man of ample and competent ability daily to perform the functions which belong to his office, under the notion that a part of the revenues of the school can be more usefully employed in instituting exhibitions. Exhibitions and scholarships are, no doubt, very useful to a school, if sufficient means be left for providing ample instruction; but I am of opinion that such instruction is the first thing to be provided. Without binding myself as to what I shall do when the scheme comes before me in chambers, I throw this out as being the general view I take of this subject.

I have felt some difficulty with respect to the advowson. If the vicarage had been in the same parish, or within a reasonable distance, and the parochial duties had not been very severe, I should have thought that the master, or the usher, might also have usefully filled the office of vicar of the parish; but if, as I am informed, it is at such a distance as to render the performance of the duties of both offices totally incompatible, it becomes impossible to permit it. In that case I am disposed to concur with the Solicitor-General in thinking, that the better course would be to sell the advowson, and invest the produce for the benefit of the school. I apprehend that there can be little doubt that this Court has the power of disposing of the vicarage for the benefit of the charity, and that had therefore better be done.

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No species of blame can attach to the present master, and I shall certainly give him his costs out of the charity estate. But there is this difficulty; I object to a charity being burdened with a mortgage, for the purpose of paying costs, unless at the same time a sinking fund is provided for its repayment. This I suggest, in order that the Solicitor-General may consider in what way it would be best to frame the decree.

GREENSLADE *v.* DARE.

November 10.

On the principle of protecting property pending litigation, the Court will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a Defendant claiming to be a purchaser for valuable consideration without notice under it.

THIS was a motion to dissolve an injunction, restraining the Bishop of *Bath and Wells* from instituting to the rectory of *Chipstable* the Rev. *Walter Dare*, or any other clerk, presented by the Defendant *Charles Holcombe Dare*.

On the 24th of *June*, 1815, the Rev. *Simon Slocombe Richards* (the rector), in consideration of 1,000*l.* conveyed the advowson and the manor of which he was seised in fee, to *John Clarige*, his heirs and assigns; and on the same day, he demised the rectory and the tithes (then of the yearly value of 350*l.*) to *Clarige*, during his (Mr. *Richards*’s) life, or so long as he should continue rector, at the yearly rent of 100*l.* The bill alleged that the receipt of the 1,000*l.* was not indorsed on the conveyance, and that, in fact, that sum had never been paid, and was an inadequate consideration; that Mr. *Richards* was, then and previously thereto, of unsound mind, and incapable of managing his affairs; and that the sale was fraudulent.

Clarige afterwards sold the advowson and manor,
and

and his interest in the rectory and tithes, and ultimately the advowson became vested in the Defendant *Dare*.

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Mr. *Richards*, in 1810, obtained from the bishop licence for non-residence, on account of infirmity or derangement of mind (as the bill alleged), and this, at the time of the conveyance, *Clarige*, with whom Mr. *Richards* resided, knew or might have known.

Mr. *Richards*, subsequently to 1815, went to *America*, and he returned in 1823. On the 9th of *February*, 1852, a commission *de lunatico* was issued against him, and he was found to be a person of unsound mind from the 1st of *January*, 1825, and not from an earlier period, there being no evidence given as to the state of his mind while in *America*.

Mr. *Richards* died on the 19th of *April*, 1853, intestate, leaving the Plaintiffs, *Elizabeth Greenslade* and *Mary Greenslade*, his co-heiresses at law, who filed their bill against Mr. *Dare* and the Bishop of *Bath and Wells*, to set aside the conveyance of 1815, as fraudulent and void, and to restrain the Defendant *Dare* from suing out a writ of *quare impedit* against the bishop to compel institution of any clerk presented by him, and to restrain the bishop from instituting such clerk.

In *July*, 1853, the Plaintiffs obtained an injunction restraining institution of the Defendant *Dare's* clerk by the bishop. The Defendant *Dare* put in his answer, stating that he was a purchaser for valuable consideration without notice. He now moved to dissolve the injunction. The Plaintiffs resisted the motion, on the ground that if the Defendant *Dare's* clerk were once instituted he could not be removed, and the question at issue would thereby be practically determined.

Mr.

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Mr. *Lloyd* and Mr. *C. Brown*, for the motion, contended, that the case made by the bill was a simple equitable case for setting aside a conveyance, on the ground of fraud, of which lunacy was one of the constituent parts, and that a Court of Equity would not interfere to set aside a contract, even if it were overreached by an inquisition in lunacy (which it was not), if it was fair and without notice, as it was in this case; *Niell v. Morley* (a); *Price v. Berrington* (b); *Hiern v. Mill* (c). That the Defendant, therefore, who was a purchaser for valuable consideration without notice, ought not to be restrained from the exercise of his legal right of presentation, and that the injunction ought to be dissolved.

Mr. *R. Palmer* and Mr. *Karslake*, for the Plaintiffs.

The MASTER of the ROLLS.

The principle on which this Court has acted, and ought to act, in cases of this description is clear. I consider that one of the most valuable functions of this Court is to preserve property pending litigation. When I was applied to, in this case, for an *ex parte* injunction, I was told, that the Plaintiffs claimed the advowson as heirs of the original owner, and that the Defendant claimed it as purchaser, I will assume, without notice. It then appeared to me, that the determination of the questions between the parties would be precluded, if the Ordinary were allowed, pending the suit, to induct the Defendant's clerk into the living, as he would become irremovable. In point of fact, the litigation would be determined in the Defendant's favour, not only without a hearing, but without the possibility or means of a hearing, for the Ordinary possesses none.

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(a) 9 *Ves.* 478. (b) 3 *Mucn. & Gor.* 486. (c) 13 *Ves.* 114.

I thought, therefore, that it was fitting to restrain the filling up of the living until I had heard more of the case.

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An application is now made to dissolve that injunction, by the Defendant, who claims to be, and brings forward a great deal of evidence for the purpose of establishing, that he is a purchaser for valuable consideration without notice, and that the Plaintiffs have no right whatever to a decree in this cause.

If, upon this motion, I should be of opinion that the Defendant had made out that case upon the affidavits, and I acted accordingly, and allowed the Ordinary to induct his clerk, that would not stop the cause. The Plaintiffs would be entitled to bring it to a hearing, and upon the hearing of the cause, upon the evidence regularly taken, I might come to an opposite and different conclusion. What possible means should I then have of setting the matter right? It is true, as was observed by Mr. *Brown*, that this Court now gives great facilities for determining questions upon motions, but the modern practice has made no difference in this:—that the questions in issue between the parties are to be tried at the hearing of the cause; and although this Court regards with favour the case of a purchaser for valuable consideration without notice, yet there being a real question in the cause between the Plaintiff and the Defendant, it does not allow the Defendant to take the fruit, on an allegation on his part, even though supported by evidence, until the hearing of the cause, for then, and not until then, is the question in the cause to be determined. Take the familiar illustration which Mr. *Lloyd* himself suggested:—suppose there is money in the funds, which, in default of appointment by the tenant for life, belongs to *A. B.*, and that upon the death of the tenant for

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for life, *A. B.* filed a bill in this Court, saying, "I am entitled to this fund in default of appointment; and although an appointment has been made, yet it was improperly obtained, and would be set aside in this Court." If I were informed that the trustee was about to transfer the money to either of the parties (it would be indifferent to me which), I should preserve that property by restraining the transfer to any one, in order that, at the hearing of the cause, the Court might have the means of giving it to the person who then made out his right to it.

I express no opinion whether this cause will be more properly tried at law or in equity, but of this I am confident, that it must be tried in one or other of these places; and if I dissolve the injunction, and the Ordinary were thereupon to induct a clerk, the result would be, that it could not be tried with any effect either at law or in this Court. I will give every possible facility for having the cause speedily tried, but I am of opinion that I must refuse this motion. Reserve the costs of it (*a*).

(*a*) See *Dowling v. Maguire, Ll. & Goo.*, temp. *Plunket*, 1; *Nicholson v. Knapp*, 9 *Sim.* 326.

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CROWE v. CRISFORD.

November 16.

WILLIAM CROWE, by his will, appointed *Alexander Crisford* and *John Crowe* trustees and executors thereof; and subject to certain devises and bequests, including a bequest to his wife *Eliza Crowe*, of furniture, plate, &c., for life, he devised and bequeathed all other his freehold, copyhold and leasehold estates whatsoever, and wheresoever, and all his stocks, funds and securities, shares in public companies, and other his personal estate whatsoever, unto his said trustees, their heirs, executors, administrators and assigns, upon trust to receive the rents, issues and profits thereof, and thereout to keep all the houses and buildings in good, substantial and tenantable repair, to pay the premiums for insuring the same from fire, and all other outgoings usually paid by landlords, and also to pay the renewal fine and expenses, whenever any of his leasehold estates should come in course of renewal, and all other expenses attending the performance of the trusts of that his will; and then, upon trust to pay the net income arising from his said residuary real and personal estates unto his wife *Eliza Crowe*, for and during the term of her natural life. And from and immediately after his decease, he gave, devised and bequeathed all his residuary real and personal estates unto the plaintiffs *John M. Crowe* and *William M. Crowe*, to hold to their heirs, executors, administrators and assigns, according to rebuilding the houses.

Part of the testator's property being at his death invested on insufficient securities, an inquiry was also directed, whether any and which of the outstanding debts due to the testator should be got in.

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to the nature and tenures of the said estates, respectively share and share alike.

The testator died in 1852. His estate, at the time of his death, consisted of several freehold, copyhold and leasehold properties, of various sums of money secured upon mortgages, bonds, bills and notes, of various shares in public joint stock companies, and of other particulars.

Some of the houses, part of the property, were out of repair at the testator's death, and were nearly all held upon lease from colleges at *Cambridge*, without any covenant for renewal. Several of the mortgages upon the leaseholds were insufficient securities, according to a valuation taken by the executors.

Three questions arose upon the construction of the will: first, whether the repairs of the houses were to be borne by the *corpus* or the income of the estate; secondly, whether Mrs. *Crowe* was to enjoy the income *in specie*; and thirdly, whether such of the mortgages, as were on insufficient securities, should be called in.

Mr. *Lloyd* and Mr. *Hobhouse*, for the Plaintiffs (the remainder men). The houses were very much out of repair at the testator's death, and the widow insisted that they ought to be put into repair at the expense of the estate, and afterwards out of the income; but no such distinction can be maintained, for the payment of renewal fines, premiums for insurance, &c., are also directed out of the income.

As to the enjoyment *in specie*, it is clear the wife was not to have the whole income of the property, which was

of a perishable nature, for the testator gives the proceeds of the whole property to the trustees, to enable them, among other things, to renew and give the leaseholds a permanent character. And so far from the direction to keep in repair being an argument in favour of the widow, it leads to the opposite conclusion, for the testator has endeavoured to give to the leaseholds a permanent and imperishable nature. The case is even stronger than *Howe v. Lord Dartmouth* (a). The shares, though not a wearing-out property like the leaseholds, ought to be converted; *Thornton v. Ellis* (b).

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Mr. Glasse and Mr. Welford, for the executors.

Mr. R. Palmer and Mr. J. W. Stephen, for the widow. The direction given in the will to the executors "to keep all the houses and buildings in good repair," implies, that the houses are, in the first instance, to be put into repair at the expense of the estate, and then to be *kept* in necessary repairs out of the income. As to the enjoyment *in specie*, it is clear on the authorities, that the widow is entitled to the income of the leaseholds *in specie*, for the testator expressly gives her the net income of the rents, &c.; and as to the shares, they are of a more permanent nature and ought to follow the same rule.

The MASTER of the ROLLS.

This is not a case for conversion. A current of authorities has established the rule (c), that where "rents" are referred to, the person taking a life estate is entitled to the enjoyment of the property *in specie*; and besides, the

(a) 7 Ves. 137 a.
(b) 15 Beav. 193.

(c) See *Goodenough v. Tremamondo*, 2 Beav. 512.

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the provision as to paying fines for renewal and keeping in repair, with respect to the leaseholds, shows, that they were not to be converted. In this case, therefore, the widow is entitled to enjoy the property *in specie*. But such enjoyment *in specie* is not any impediment to the trustees getting in any outstanding estate which may be placed upon insufficient security and investing it in proper securities. There must be an inquiry whether any and which of the outstanding debts due to the testator should be got in.

As to repairs, "keeping in repair" means to expend money in putting the leaseholds in repair, assuming them to be out of repair. They must be put in repair, from time to time, out of the income, that is, in ordinary repair; but the income is not to be applied in such extraordinary repairs as would be equivalent to rebuilding the house.

In re ANDREWS.

November 17.

The Court of a Revising Barrister is not "a Court of Law" within the Solicitors' Act, so as to exclude the jurisdiction of this Court to order the taxation of a bill containing items for business done in that Court.

MR. *ANDREWS*, a solicitor, was employed by Sir *Montague Cholmeley*, in respect of some election matters. Having delivered his bill of costs, Sir *Montague* obtained an order of course at the Rolls for its taxation, on the allegation, that the bill "did not contain any item for business done in either of the Courts of Law or Equity."

The bill, however, under the date of the 20th *August*, 1851, contained the following items:—"Attending to and conducting the registration for the *Lincoln* district of the parts of *Lindsey* for this year, according to agreement, 25*l*."

Mr. *Andrews*, in his affidavit, explained, that this related to and was for business done by him for Sir *Montague Cholmeley*, in preparing and making claims for parties favourable to the interest of Sir *M. Cholmeley*, desirous of being and qualified to be placed upon the register of voters for the county for which Sir *M. Cholmeley* was then the sitting member, and for preparing and making objections to parties unfavourable to him remaining on the register of voters; and afterwards, attending the Court of the Revising Barrister, for the purpose of supporting such claims and objections, so made on behalf and in the interest of Sir *M. Cholmeley*, and for the purpose of resisting the claims and objections made by and on behalf of parties opposed to the interest of Sir *M. Cholmeley*.

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Mr. *Andrews* now moved to discharge the order for taxation.

Mr. *Lloyd* and Mr. *Hallett*, in support of the motion.

The Solicitors' Act (6 & 7 *Vict.* c. 73 (a)) authorizes the Lord Chancellor or Master of the Rolls to order the taxation of a bill, in case the business, or any part thereof, has been transacted in Chancery, or in any other Court of Equity or in Bankruptcy or Lunacy, "or in case no part of such business shall have been transacted in any Court of Law or Equity." But if any part of such business shall have been transacted in any other Court, the Queen's Bench, &c., are authorized to make the order.

The order has been obtained on the assumption and positive allegation, that the bill contains no item for
business

(a) Sect. 37.

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business in a Court of Law. This is not the fact. The open Court of the Revising Barrister, under the 6 & 7 Vict. c. 18, s. 32, is a Court of Law, to determine the right of parties to vote, which is a recognised legal right, *Ashby v. White* (a); and there is now an appeal to the Court of Common Pleas. It has been decided, that the Central Criminal Court is a Court of Law, so as to authorize a taxation; *Curling v. Sedger* (b). It is not disputed that the bill is taxable, but it ought to be taxed at law.

They also cited *In re Branson* (c); and distinguished *Re Gaitskill* (d).

Mr. *R. Palmer* and Mr. *Shapter*, *contrà*. The Court of the Revising Barrister is not a Court of Law; it is a Court of Registration only, wherein the rights of contending parties are not decided. Sir *Montague* was not a litigant party therein and the supporting of the rights of others would be pure "maintenance." The mere fact of being constituted or called a "Court" does not necessarily make a Court a Court of Law. Thus, the High Court of Parliament, the Court of Common Council, the Court of Aldermen and the Courts Baron and Leet, though Courts, are undoubtedly not Courts of Law.

The specification in the Solicitors' Act of business in bankruptcy and lunacy shows, that, but for that, they would not have been considered as Courts of Law.

Mr. *Lloyd*, in reply.

The MASTER of the ROLLS.

I am of opinion that the Court has jurisdiction to
 order

(a) 1 *Salk.* 19; *Holt*, 524; 8
St. Trials, 89; 2 *Lord Raym.*
 938.

(b) 4 *Bing. (N. C.)* 743.
 (c) 3 *Bing.* 783.
 (d) 1 *Phillips*, 576.

order the taxation of this bill. The statute says, that "in case no part of such business shall have been transacted in any Court of Law or Equity," the Lord Chancellor or the Master of the Rolls may order the taxation of a bill.

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The only question is, whether, on the construction put on those words, the business mentioned in this case comes within the definition "business transacted in a Court of Law."

The first thing which struck me, as it did Lord *Lyndhurst* in *Re Gaitskell*, was the generality of these words, "business transacted in any Court of Law or Equity." Lord *Lyndhurst* says, "it appears that those words are borrowed from the statute of *Geo. 2*, where they have been repeatedly the subject of judicial decision; and the doctrine of all the cases is, that to come within the meaning of those words, the business must be some proceeding either in a suit or with a view to a suit." This is the key to the construction.

The question here is, whether the items which are here stated, "attending to the registration of *Lincolnshire* in the year 1851," is a proceeding either in a suit, or with a view to the suit, in a Court of Law or Equity? That is the question I have to consider in this case.

I am of opinion, though I do not know whether it is necessary to come to a conclusion, that the Registration Court is not a Court of Law or Equity within the statute. I concur in an observation of Mr. *Palmer*, that the mere fact of calling it a "Court" does not make it a Court of Law or Equity. It is a Court of Registration; its object is not to determine rights between contending parties, but the rights of persons to exercise

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high constitutional functions, and to ascertain who are entitled to exercise these rights; and although many nice questions may arise, and although the rights as between parties may have, incidentally, to be determined by the Revising Barrister, still there is no suit or action between parties, though one person claims a vote and another objects to it. The whole object is, to perfect and make accurate the list of persons qualified to exercise the functions of voters. It is easy to illustrate it thus:—In the Court of Common Council or of Aldermen a question might arise, in which it might be necessary to employ a solicitor, but that would not make them Courts of Law or Equity within the statute.

I am strengthened in this by the fact, that there is no observation which has been made as regards the Registration Courts, which would not equally apply to the Court of Bankruptcy, and yet the act specified proceedings in bankruptcy or lunacy, which would be unnecessary if they were Courts of Law or Equity. Even if Registration Courts were considered Courts of Law, still it would be difficult to hold, that the objecting to a vote or the defending the right to be on the list of voters, on behalf of a candidate, would be a proceeding either in a suit or with a view to a suit on his part. I cannot distinguish this from the employment of a solicitor to go into Court and take a note of the proceedings in which the employer might be materially interested, and might consider of importance to him, but to which he was no party. That would not be a proceeding, either in a suit or with a view to a suit. In that view, it is impossible to say, that this is a proceeding in a Court of Law or Equity within the meaning of the statute. It is said, that the bill ought to be taxed at law, but this is merely saying that it is taxable by a different officer, on the same principles;

ples ; and it is admitted, that there is no taxing officer in the Registration Court.

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I was struck with the observation, that the bill delivered was not in a form fit for taxation ; and although I must refuse this application with costs, it must be without prejudice to the right of Mr. *Andrews* to present a petition for leave to amend the bill delivered by him(a).

(a) See *In re Wells*, 8 *Beav.* *re Walters*, 9 *Beav.* 299; and the 416; *In re Carven*, *ib.* 436; *In* note, *ib.* p. 302.

TURNER v. SARGENT.

Nov. 19, 21.

IN 1841, the testator, *William Beckett Turner*, by his will devised certain real estate, and bequeathed certain personal estate to his wife for life, and after her decease, to his daughter *Mary Jane* absolutely ; and he gave his residuary personal estate to his son *William* and his daughter *Mary Jane* equally. By the first codicil to his will, dated in *February*, 1843, A testator, by his will, gave real and personal property to his daughter *A.* absolutely ; but by a codicil made subsequent to her marriage, he directed that the " it should be settled to the

exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children, equally, after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share ;" and, in default of such children or other issue, over. Held, that the property must be settled in trust for *A.* for life, to her separate use, without power of anticipation ; and, after her decease, upon trust for such of her children as should survive her, and for the issue living at her death of such of her children as should not survive her, equally, as tenants in common, the issue to take *per stirpes*, but *inter se* equally as tenants in common.

That there should be limitations in the nature of cross-remainders in favour of such of the children and issue as should survive *A.* in respect of the share of any child dying in her lifetime without leaving issue, and in respect of the share of any issue of any child similarly dying.

That the realty should be settled as realty ; and (as the testator, by simply directing a settlement, must have intended) with powers of leasing and sale and exchange, and with a receipt clause ; and

That the settlement should contain provisions for maintenance, education and advancement, and a power to appoint new trustees.

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the testator proceeded thus:—"I further direct, that all the property, real or personal, given in my said will to my daughter *Mary Jane* (now Mrs. *Sargent*), shall be so settled, to the exclusion of her present or any future husband, that the same may belong to my said daughter during her life, and be secured for the benefit of her children, if more than one, equally, after her death, so that the issue of any such child dying in my daughter's lifetime may take his or her parent's share; and in default of such children or other issue, then to my son *William* absolutely, but so that my said daughter shall be empowered by will, if she thinks fit, to give her husband a life income, after her own death, in the said property."

The testator died on the 15th of *July*, 1846.

There were issue of the marriage between *Thomas Sargent* and *Mary Jane*, five children.

The executors filed a bill against Mr. and Mrs. *Sargent* and their children, for the purpose of having a proper settlement made under the direction of the Court. The decree directed, that a settlement should be prepared in accordance with the terms of the first codicil to the will. Difficulties, however, having arisen in chambers as to the frame and provisions of the settlement, the Master of the Rolls directed the cause to be set down for argument by Counsel in Court, as to the construction of the codicil. The questions for consideration were—*First*, whether a restraint on anticipation should not be engrafted on a trust for the separate use for life of Mrs. *Sargent*. *Secondly*, whether the real estate should be settled as such, or as personalty, through the medium of a trust for sale, and, if as realty, what powers of leasing, sale and exchange,

ange, &c., should be inserted. *Thirdly*, whether children should take vested interests on their birth, at twenty-one, as to sons, and twenty-one or marriage, as to daughters, and only in case they survived their mother; and whether the codicil required, that ass-limitations should be inserted, in favour of the heirs and other of the children, in case of the deaths of any prior to some period or event to be determined by the Court. And, *lastly*, whether there should be inserted provisions for maintenance, education and advancement, and a power to appoint new trustees, as in the usual powers, in the absence of any directions in the will and codicil.

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Mr. *Huynes*, for the Plaintiffs, the executors, opened the case, but left it to be argued by Counsel on behalf of the parents and children.

Mr. *Lewin*, for Mr. and Mrs. *Sargent*. The question was whether the property should be settled to the separate use of Mrs. *Sargent* without power of anticipation. Where one restriction is useless without the other. Where the testator makes a bequest directly to a married woman for her separate use, and does not add a clause against anticipation, there can, in that case, of course, be no restraint put upon her dealing with it; but here the bequest is executory, and, therefore, the Court will give full effect to the intention of the testator, and direct such a settlement to be made as will effectually prevent the married woman from divesting herself of her interest. His words are, "to the exclusion of her present or any future husband, that the same may be given to my daughter during her life;" that therefore is equivalent to a restraint against anticipation. After the life estate to the daughter, the testator gives the property to two classes of objects; first, to the children

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dren of his daughter, who should survive her; and secondly, to the issue of those children who should die in her lifetime leaving issue, who are to take their parent's share. "Issue," therefore, means children, that is, grandchildren of the daughter; and when the testator, "in default of such children or other issue," gives the property over to his son absolutely, he means in default of such children as would, by force of the previous limitation, take it, that is, the two classes already mentioned. As to executory trusts in the case of marriage articles, the Court has something to guide it, for it knows of the marriage of the parties and the object of the trust; but it is different in the case of a will, and therefore the same expressions in executory trusts under marriage articles, and in a will, bear a different construction, and the Court has a larger discretion.

The MASTER of the ROLLS referred to Trevor v. Trevor(a).

Mr. *Bichner*, for the children of Mrs. *Sargent*. It is difficult to say what course is most for their benefit. If it should be decided that they take absolute vested interests, then upon the death of any of them in the lifetime of their father, his or her share would go to his father, whereas if executory trusts and cross-remainders between them are introduced, the children would have the full benefit of the gift; and that this may be done, there is the authority of *Twisden v. Lock(b)*. The limitations should be made in favour of children, grandchildren, or remoter issue of Mrs. *Sargent* living at her death, supposing that to be the period fixed by the Court,

(a) 1 *P. Wms.* 622; 10 *Mod.* 436; 5 *Bro. P. C.* 122. (b) *AmbL* 663.

Court, at which the interests are to become vested. The will is silent as to the period of vesting; and the question is, can the Court introduce a word which it thinks the testator meant.

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The MASTER of the ROLLS. I think that executory trusts must be construed in the same way, whether created by will or any other instrument, and that there must be a settlement of the property in trust for Mrs. Sargent for life, for her separate use, without power of anticipation; and, after her decease, upon trust for her children; but if any child of Mrs. Sargent shall die in her lifetime, leaving children or remoter issue who shall be living at her death, such children or remoter issue shall take the share of the child of Mrs. Sargent so dying, *per stirpes*, but, *inter se*, as tenants in common, and there must be limitations in the nature of cross-remainders in favour of the children and issue who shall survive Mrs. Sargent, as respects the share of any child dying in the lifetime of Mrs. Sargent without leaving issue, and as respects the share of any issue dying in the lifetime of Mrs. Sargent. And if no child of Mrs. Sargent, or issue of any deceased child, shall be living at her decease, there must be an ultimate trust for William Turner, so that the death of Mrs. Sargent is the period or event at which the vesting of the property in the children's issue, or in the legatee and devisee over, is to be ascertained.

Mr. Bichner. The only question which remains is, as to whether the real estate can be settled as personality, or whether it must be settled as realty; and, if so, whether powers of leasing, sale and exchange, &c., are to be introduced. In *Horne v. Barton* (a) it was held, that

a

(a) *Jac.* 437; and see *Hill v. Hill*, 6 *Sim.* 136.

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a direction in a will that certain estates should be settled, and that there should be inserted all proper power for making leases and otherwise, according to circumstances, did not authorize the insertion of a power of sale and exchange.

Mr. Rogers (amicus curiæ) referred to *Field v. Brown*, before V. C. *Stuart*.

Mr. Lewin. If for the purpose of carrying a trust into execution any particular powers are required, the Court will insert them, as, for instance, powers of leasing; *Woolmore v. Burrows*(a); and therefore the settlement must comprise powers of leasing, sale and exchange, &c. So also as to the personal estate, there must be powers to invest and vary securities.

The MASTER of the ROLLS decided that there was no power to settle the real estate as personalty, but he reserved judgment as to the powers to be inserted.

November 21. *The MASTER of the ROLLS*.

I am of opinion that the testator, having simply directed a settlement, must be held to have intended all usual powers to be included. Therefore the settlement must contain the usual powers of leasing, sale and exchange, and for the appointment of new trustees, together with a receipt clause, and provisions for maintenance, education and advancement for the children or issue living at the death of *Mrs. Sargent*, during their minority; the rents and profits of the real estate and leaseholds to be applied in the same way as the income of the general trust funds.

(a) 1 Sim. p. 518.

1853.

FELL v. JONES.

A PORTION of a residue now in Court had been assigned by *G. Hasted* to Messrs. *Colvin & Co.*, East Indian Merchants, who had become insolvent, and *Cochrane* (who was resident in *India*) was their official assignee. *Cochrane* gave a general power of attorney to *Graham* to act for him in *England*.

November 23,

A. B., who was entitled to a fund in Court, assigned it to *C. D.*, who was resident in *India*.

C. D. appointed *E. F.* his attorney in *England*. On the joint petition of *A. B.*, *C. D.* and *E. F.*, the fund was paid out to *E. F.*

This was a joint petition by *Hasted*, *Cochrane* and *Graham*, for payment out of Court of the fund to *Graham*. The difficulty which arose was, lest *Cochrane* should be dead at the time of the payment, so as to invalidate the power of attorney (a).

Mr. *Lloyd*, Mr. *Roupell*, and Mr. *Walford*, for different parties.

Ex parte Candy (b); *Ex parte Brown* (c); *Ex parte De Beaumont* (d); *Waddilove v. Taylor* (e), were cited; and see *Agabeg v. Hartwell* (f).

The MASTER of the ROLLS made the order.

(a) See *Paley's Pr. and Ag.* (3rd ed.) 186; *Mitchell v. Eades*, *Pr. Ch.* 125; *Lepard v. Vernon*, 2 *Ves. & B.* 51; *Watson v. King*, 4 *Camp.* 272; 1 *Stark.* 121; and *Bailey v. Collett*, post.

(b) 5 *L. J. (N. S.) Ch.* 14.

(c) *Ib.* 24.

(d) 13 *Jurist*, 354.

(e) *Ib.* 1023.

(f) 4 *L. J. (N. S.) Ch.* 190.

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PEATFIELD v. BENN.

November 23.

Pending a suit to displace *A. B.* (a trustee) for misconduct, he, under a power, appointed *C. D.* a new trustee. *C. D.* had notice that the *cestuis que trust* complained of irregularities in the trusts, and that *A. B.* was about to leave the country for a long while. At the hearing, *A. B.* and *C. D.* (he not objecting) were discharged from the trust. Held, that *C. D.* was entitled to no costs.

IN *March*, 1849, a bill was filed to remove the surviving trustee of a will, on the ground of his misconduct, and to appoint a new one.

In *June* following, the surviving trustee, under a power vested in him, appointed *Rigby* a trustee, who was afterwards made a party to the suit. At the hearing *Benn* was removed, and *Rigby*, who did not object, was also removed.

Mr. *J. J. Jervis*, for *Rigby*, asked for his costs, urging, that, at the time of his appointment, he had no notice of the suit, and was in the situation of a trustee duly appointed.

Mr. *Elmsley* and Mr. *Wickens*, *contra*. *Rigby* is entitled to no costs; he was appointed *pendente lite*, with notice that there existed irregularities in the trust, which the parties beneficially entitled sought to remedy, and also that the trustee was going abroad. He ought to have inquired into the matter before consenting to embarrass the parties by becoming a trustee.

Mr. *T. C. Wright*, for other parties.

The MASTER of the ROLLS.

I can neither give, nor make *Rigby* pay, costs. A gentleman before being appointed trustee is informed that the persons beneficially entitled to the trust property have had a correspondence with the existing trustee,

tee, and that they assert that the trust funds have been misapplied. He also knows that the surviving trustee was about to leave the country for a considerable time, and that the *cestuis que trust* charge him with a misapplication of the estate, and, knowing this, he consents to become a trustee without any communication with the *cestuis que trust*.

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v.
BENN.

I think that a person thrusting himself, as it were, into a trust, was bound to inquire into the existing circumstances; and though I am always disposed to give trustees their costs, considering the arduous and important duties they have to perform, I think, that a party acting in this manner is not entitled to any costs.

NOTE.—See *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *The Attorney-General v. Clack*, 1 Beav. 467; *Cafe v. Bent*, 3 Hare, 245; *Middleton v. Reay*, 7 Hare, 106.

Re SINCLAY.

A SUM, which was now in Court, had been settled on the children of Mrs. *Sinclair*.

November 25.

The child of a married woman held to be illegitimate, on proof of non-access of the husband, and of conduct and admissions of the wife and her paramour.

In 1837, Mrs. *Sinclair* separated from her husband, and they lived apart until her death, in 1844. It was proved by a witness who was intimate with the parties, that Mr. *Sinclair*, during that period, continuously resided at *Dacca*, while Mrs. *Sinclair* had during the same time resided altogether at *Calcutta*. These places were 200 miles distant.

After the separation, Mrs. *Sinclair* cohabited with a Mr. *How*, and in 1842, she gave birth to a son, who was christened as illegitimate, being described as the son of Mr.

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Re
 SINCLAY.

Mr. *How*, by *Sophia Swiden*, "not his wife." The child was always acknowledged and treated by Mr. *How* as his son, and was brought up and supported by him.

In 1844, Mrs. *Sinclair* made a will, by which she appointed the fund to her "five lawful children" (naming them), and "her dear *natural-born child, W. H. How*."

The five legitimate children now presented a petition for payment to them of the fund, and a question arose, whether *W. H. How* was entitled to a share.

Mr. *R. Palmer* and Mr. *Godfrey*, in support of the petition.

Mr. *Rasch*, for the trustees, submitted, that the evidence was not sufficient to satisfy the Court of the illegitimacy. He argued that a child born of a married woman must, in the first instance, be presumed to be legitimate, and that this presumption was only to be rebutted by the strongest and most distinct evidence. He cited *Hargrave v. Hargrave(a)*; *Le Marchant's Gardner Peerage Case*.

The MASTER of the ROLLS.

The Court has never laid down any such rule as this:—that the evidence of a fact must be different in different cases. All that is required in every case is, that the evidence shall be sufficient to satisfy the Judge of the fact. I agree, that the legitimacy of a child of a married woman is to be presumed, until the contrary has been proved; but I am of opinion, in this case, that the evidence proves the illegitimacy. In the first place, a
 witness,

(a) 9 *Beav.* 552.

who has the means of knowing the fact, proves possibility of access on the part of the husband. Besides evidence, that the child was baptized intimate and under the name of another person; mother, in a solemn instrument, speaks of him "natural-born child," and calls him by the name he was baptized. He was never recognized by husband, but has always been recognized, maintained and supported by his reputed father. These taken together, lead irresistibly to the conclusion, was the son of *How*, and not of *Sinclair*, and hence that he was illegitimate.

and not, therefore, entitled to any portion of the fund.

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HUNT v. PENRICE.

November 4, 5.
December 2.

Property was bequeathed in trust for *Constantia Gosling* for life, with remainder to her son, and in default to the Plaintiff, Mrs. *Hunt* and hers.

According to the statements in the bill, *Constantia* married, first, *Alexander Campbell*, and secondly, *John Corley*, and she died in 1851, "without ever having any issue." The Plaintiff having applied to trustees to pay over the money, they refused, alleging the Defendant, *Alexander Francis Campbell*, told it "as being the only child of *Constantia*."

The bill charged, that *Constantia* never had any issue, and

that *A. B.* left issue one child, viz. himself, the Defendant. The bill, being informal, it not being accompanied by an answer to charges in the bill, that her correspondence with her family, never alluded to her being pregnant, or to the Defendant otherwise than as her adopted child, &c. &c.

When a bill alleges facts, which, if true, would contradict or be evidence to discredit a plea, the plea must be supported by an answer denying, or at least giving the Plaintiff discovery as to those facts.

A Plaintiff claimed as remainder-man upon default of issue of *A. B.* The Defendant

Held, that the bill, being informal, it not being accompanied by an answer to charges in the bill, that her correspondence with her family, never alluded to her being pregnant, or to the Defendant otherwise than as her adopted child, &c. &c.

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and that the Defendant, *Alexander Francis Campbell*, was not her child, but the child of some other woman, and adopted by her. The bill also alleged as follows:—

29. That *Constantia Campbell*, during the time she was the wife of *Alexander Campbell*, continually corresponded with her brother and sisters and other members of her family, yet she never, in any manner in the course of such correspondence, stated that she was, or in any manner alluded to her being pregnant or delivered of any child, or alluded to *Alexander Francis Campbell* otherwise than as her adopted child.

30. That *Alexander Campbell* made his will in *May*, 1819, and thereby disposed of considerable property, yet he made no devise, bequest, or disposition of any property to or in favour of *Alexander Francis Campbell*, or ever, in any manner, referred to him, and never in any manner referred to his having any son.

31. That *Alexander Francis Campbell* was never treated, known or reputed by the said *Alexander Campbell*, or any of his family, relations or friends, as the son of *Alexander Campbell* by *Constantia Gosling*, and he was never treated or recognized by any of the family or relatives of *Constantia Gosling* (afterwards *Campbell*), as her son, or otherwise than as her adopted son.

The Plaintiff interrogated the Defendant as to these statements in the usual form.

To this bill, the Defendant, *Alexander Francis Campbell*, pleaded, that *Constantia Campbell*, improperly called *Constantia Corley*, left issue, at the time of her death, one child, viz., the Defendant *Alexander Francis Campbell*

Campbell, who had attained twenty-one years; that *Constantia Campbell* was delivered, on the 26th of *January*, 1813, at Bridge House, Colchester, of a son, who was the defendant, *Alexander Francis Campbell*, and she was then the wife of *Alexander Campbell*; and that he was baptized on the following day by a Roman Catholic priest, as the son of the said *Alexander Campbell* and *Constantia*, his wife. The Defendant then averred, that *Constantia* left, at her death, a child, viz., the Defendant. No answer accompanied this plea.

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The plea now came on for argument as to its sufficiency.

Mr. *Roupell* and Mr. *Piggott*, in support of the plea. The only point really in contest between the parties is whether the Defendant is the son of *Constantia*, and this is properly put in issue by a negative plea. The Defendant must give every discovery which can support the Plaintiff's case, but he is not bound to set out his own title, or the evidence in support of it, or to give discovery which will destroy and not assist the Plaintiff's case. The *onus* of proving the truth of the plea lies on the Defendant, and if he should be able to do so to the satisfaction of the Court, the Plaintiff's case will be at an end. The Plaintiff requires no evidence or discovery, for the Defendant is bound to prove the assertions contained in his plea, viz., that he is the son of *Constantia*. They referred to *Jones v. Davies* (a); *Thew v. Lord Stafford* (b).

Mr. *R. Palmer* and Mr. *Southgate*, for the Plaintiff, *contrd.* This plea is informal; it wants the necessary averments

(a) 16 *Ves.* 262.

(b) *V. C. Stuart*, unreported.

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averments and answer to support it. The rule is, that a plea which negatives the Plaintiff's title, though it protects a Defendant, generally, from answer and discovery as to the subject of the suit, does not protect him from answer and discovery, as to such matters as are specially charged as evidence of the Plaintiff's title. *Sanders v. King* (a); *Crow v. Tyrell* (b); *Emerson v. Harland* (c). The rule is stated by Lord *Langdale* thus:—"You are to answer every thing charged in the bill, which, if true, would displace the plea; and this you must do, whether the bill does or does not expressly charge those matters to be evidence of the facts;" *Chadwick v. Broadwood* (d). The rule is also stated by Lord *Cottenham* still more distinctly. He says:—"You cannot plead the negative of the fact, without denying those allegations in the bill which have a tendency to prove that fact;" *Denys v. Locock* (e).

A Plaintiff is entitled to a discovery of that which will repel the case set up by the Defendant, *Attorney-General v. Corporation of London* (f), as well as of that which he avers will establish his own title; *Stainton v. Chadwick* (g). All the facts which are alleged in the 29th, 30th, and 31st paragraphs, if proved, would be evidence to go to a jury on the issue of fact raised by the plea. The Plaintiff is therefore entitled to a discovery of them, in order that they may be brought before the Court at the hearing of this cause. Again, the Defendant may have in his possession documents which will clearly establish the Plaintiff's case.

They

(a) 6 *Mad.* 65.(b) 2 *Mad.* 409.(c) 3 *Sim.* 490; 8 *Bligh*, 62.(d) 3 *Beav.* 540.(e) 3 *Myl. & Cr.* 231.(f) 2 *Mac. & Gor.* 247.(g) 3 *Mac. & Gor.* 575; *Beav.* 320.

They also cited *Wigram on Discovery* (a); *Redesdale* (b).

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v.
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Mr. Roupell, in reply, cited *Ord v. Huddleston* (c).

The MASTER of the ROLLS.

I wish to look at the authorities; but evidently the contest is useless to both parties, for the Plaintiff cannot expect much information from the answer, nor can the Defendant be much inconvenienced from disclosing his title. Although it may not be productive of benefit to either party, yet it may be of importance as regards the course of proceeding in this Court.

The MASTER of the ROLLS.

December 2.

This is a plea put in to a bill filed by the Plaintiffs, claiming to share in a considerable sum of money in the funds, in the names of trustees, to which the Plaintiff *Thomas Hunt*, in right of the co-Plaintiff his wife, would be entitled, together with several of the Defendants, under the trusts of the will of the testator *Francis Gosling*, in case the daughter of the testator, *Constantia Gosling*, died without issue.

The bill alleges, that *Constantia Gosling* married Mr. *Campbell* and died without issue in the month of *January*, 1851.

The plea avers, that the Defendant *Alexander Francis Campbell* is the son and only child of the said *Constantia*

(a) Sect. 102. (b) Page 244, 4th edit. (c) 2 *Dick.* 510.

1853.
HUNT
v.
PENRICE.

stantia Campbell; and the question is, whether the plea ought not to have been supported by an answer to certain statements contained in the bill, to which the Defendant is interrogated, and which, if admitted, might tend to invalidate the plea. These statements of the bill are contained in paragraphs 29, 30, and 31, and they are to this effect. (*His Honor read them.*)

It is manifest, that this plea raises the only issue between the Plaintiffs and the Defendant; and it is also plain, that these statements, to which the Defendant is interrogated, are of such a nature, that even, if true, he is not likely to have any knowledge of them—at least of those contained in paragraphs 29 and 31—and that the statement contained in paragraph 30 is a fact, which, if at all, can be proved by the production of the probate, or of an attested copy of the will of *Alexander Campbell*: and it requires little experience in this Court to see that if an answer is compelled to be put in by the Defendants to the allegation, the answer will, in all probability, be of little benefit to the Plaintiffs. This was so manifest to me during the argument, that I certainly felt desirous to allow this plea, provided I could do so consistently with the settled rules of pleading in this Court; and I reserved my judgment in consequence, in order to look through the authorities, and consider the distinctions which exist in the books on this subject. The result however has been, that I have come to the conclusion that I cannot, consistently with these settled rules, allow this plea.

The rule has, I think, been correctly stated at the Bar to this effect: That where the bill alleges facts, which, if true, would contradict or be evidence to discredit the plea, the plea must be supported by an
answer,

answer, if not denying, at least giving the Plaintiff discovery as to these facts. I am unable, as I was at first disposed to do, to draw any distinction between the greater and less degree of materiality of these facts, assuming them to be to some extent material. If it be true, as it undoubtedly is, that the statement of a fact, which, if true, would be inconsistent with the truth of the plea, must be answered, it follows that the statement of every fact which would, as far it goes, be evidence against the truth of the plea, must also be answered; for this Court would in vain attempt to draw any line of distinction that would be intelligible, as to the weight to be attributed to different classes of such facts, assuming them to be proved or to be admitted by the answer: such, for instance, as to lay down a rule, that the discovery must be given where the fact stated, if true, would absolutely disprove the fact pleaded, from the impossibility of both being true; and that such discovery need not be given when the fact alleged was such, that if true, it created only a very high degree of improbability, that the fact pleaded, and the facts alleged, could both be true.

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The rule, as stated by Lord *Eldon* in *Jones v. Davis* (a), that the Defendant must answer as to facts, which would be evidence before a jury to disprove the plea, is a plain and intelligible rule, and one that I consider myself bound by. The facts alleged in these three paragraphs are such as, if proved or admitted, might influence a jury or the Court in coming to a conclusion on the truth or falsity of the fact pleaded; and I am, therefore, of opinion, that they should have been answered, and that the plea is bad, by reason of its containing no such answer to them.

I shall

(a) 16 *Ves.* 262.

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HUNT
v.
PENRICE.

I shall, therefore, in this case, direct the plea to stand for an answer with liberty to the Plaintiff to except, but, under the circumstances of this case, I shall direct the costs of the plea to be costs in the cause.

Nov. 19, 21.

December 2.

YOUNG v. WHITE.

To a bill for the infringement of a patent, the Defendant pleaded, that the Plaintiff was not the first inventor. Held, that the Defendant need not answer any fact alleged by the bill, which would not be evidence to go to a jury on such an issue. As, for instance, the accuracy of the specification; the novelty of the process; the assignment of the patent; the expenditure of money on it; the obtaining Scotch and Irish patents

THE Plaintiffs were entitled to a patent, dated 17th of October, 1850, for obtaining *Paraffine* oil and *Paraffine* from bituminous coal. They alleged, that the Defendants had pirated their invention, and sought an injunction and the account usual in such cases.

The Defendants put in a plea and answer; the plea asserting, that the Plaintiff *James Young* "was not the true and first inventor" of the process specified in the patent. They coupled this plea with an answer to those parts of the bill which they considered not to be covered by the plea. The passages in the bill, which the Plaintiffs alleged ought to have been answered, were the paragraphs numbered as follows:—4 and 5, which contained a statement of the accuracy of the specification of the letters-patent that *James Young* was the first and true inventor. 6. That he assigned the letters-patent to the other Plaintiffs. 7. That they had for the process or allegations as to the opinions of third parties as to the invention, and the truth of the assertions of third parties respecting it, &c. &c.

On a motion for an injunction to restrain the alleged infringement of a patent, the Defendant insisted, first, on the invalidity of the patent; and, secondly, that he had not infringed it, and an action was directed. Afterwards, the Defendant pleaded in equity simply the want of novelty of the patent. This Court, on allowing the plea, gave the Plaintiff liberty to apply to modify the order made on the application for the injunction, so as to make it conformable to the issue tendered by the plea.

aid out large sums of money in erecting works for working the patent, and had used the invention. 8. That the letters-patent for the invention had been granted to *James Young* for *Scotland* and *Ireland*.

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The 10th, 11th, 12th and 13th paragraphs were to this effect:—10. That the *Times* newspaper, on the 6th of *September*, 1850, stated, that *Mr. Young* was the inventor of this process, and that the invention was one of great value. 11. That a prize medal had been awarded by the jurors of the Great Exhibition to *James Young* for his invention. 12. That in the report of the jurors, he was stated to have been the inventor of this process, one of great value, which realized a problem which *Baron Liebig* stated to be one of the great considerations in chemical science. 13. That the statements contained in these paragraphs were true. 14. That *Mr. Playfair* had expressed an opinion in favour of *Young* being the inventor. Subsequent paragraphs alleged, that the Defendants were using the process discovered by *Young*, and the interrogatories contained searching and minute inquiries as to the process used by the Defendants.

The plea now came on for argument.

Mr. Daniel and *Mr. Little*, in support of the plea. The plea properly reduces the litigation to this single point: was *Young* the first inventor, that is, is the patent valid or not? The answer which accompanies the plea furnishes a full discovery to all the matters needing to prove the Plaintiffs' case. As to the rest, is a mere fishing attempt to ascertain the Defendants' trade secrets. They cited *Stead v. Williams* (a); 36,

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(a) 7 *Man. & Gr.* 818.

1853. 37 and 38 *Orders of 26 August, 1841* (a); 15 & 16
 Vict. c. 83; *Hindmarch on Patents* (b).

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Mr. R. Palmer and Mr. Giffard, *contrà*. The plea is insufficient, not being accompanied by an answer to the several interrogatories relating to matters, which, if answered, might tend to prove the Plaintiffs' case and disprove the Defendants'. They cited *Swinborne v. Nelson* (c); *Emerson v. Harland* (d); *Jones v. Davis* (e); *Denys v. Locock* (f); *Allen v. M^r Pherson* (g).

Mr. Little, in reply.

The MASTER of the ROLLS reserved his judgment.

December 2. The MASTER of the ROLLS.

In this case, there arises a question closely analogous to that which occurs in the case I have just decided (h); and, therefore, I shall not repeat here the principles which, as I conceive, govern these cases, but consider solely their application to the one now before me.

The Plaintiffs are the patentees and the assignees of the patentee of a patent for obtaining *Paraffine* oil and *Paraffine* from bituminous coal. They allege, that the Defendants have pirated their invention, and they seek an injunction and the account usual in such cases.

The Defendants have pleaded, that the Plaintiff *James Young*

(a) *Ord. Can.* 175.

(b) Page 448.

(c) 16 *Beav.* 416.

(d) 3 *Sim.* 490; 8 *Bligh*, 62.

(e) 16 *Ves.* 262.

(f) 3 *Myl. & Cr.* 205.

(g) 5 *Beav.* 469; 1 *Phill.* 142; 1 *H. Lds. Cas.* 191.

(h) *Hunt v. Penrice*, ante, 525.

Young is not the first and true inventor of the process specified in this patent. They have coupled this plea with an answer to such parts of the bill as they consider not to be covered by the plea.

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The great difficulty which formerly resulted, in such cases, from the circumstance, that the bill usually contained statements, which, although covered by the plea, in part, were also in part such as the Defendant was bound to answer, has been removed by the Orders of the Court (a), which direct, that a plea is not to be overruled because the Defendant has submitted to answer a part of the bill covered by the plea.

This order, however, leaves untouched the rules which compel the Defendant to answer all such parts of his bill as contain statements of facts, which, if true, would be evidence to disprove the fact pleaded. This the Plaintiffs allege the Defendants have failed in doing, and they point out various passages in the bill not answered, which they allege are of this description. I shall consider, *seriatim*, all the passages not answered by the answer accompanying the plea. The first of them are the paragraphs of the bill numbered from 4 to 8 inclusive: these contained a statement of the accuracy of the specification of the letters-patent that *James Young* was the first and true inventor, that he assigned these letters-patent to the other Plaintiffs, and that they have laid out large sums of money in working the patent, and have used the invention since the date of the letters-patent, and have also obtained letters-patent for the invention for *Scotland* and *Ireland*. I think that all these facts are properly covered by the plea, and that these paragraphs do not contain facts which would be evidence before a jury to discredit the

(a) Ord. Can. 175.

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the plea. It is true, that the granting of letters-patent may, if undisputed, be *prima facie* evidence that the patentee is the first and true inventor, but this is nothing more than the title of the Plaintiff to call upon the Defendant to defend his use of that invention, and would not, I think, at a trial at law, be submitted to the jury by the Judge, or even insisted upon by the Counsel of the patentee, as furnishing any evidence to lead the jury to the conclusion, that the patentee was the first inventor. The only effect of it is, I conceive, to throw the burden of proof on the Defendants, and this they undertake to do by their plea.

The next paragraphs not answered are the 10th, 11th, 12th and 13th. These are to this effect:—that the *Times* newspaper stated, that Mr. *Young* was the inventor of this process, and the invention was one of great value; that a prize medal was awarded by the jurors of the Great Exhibition to *James Young*, for his invention, and that in the report of the jurors, he is stated to have been the inventor of this process; that it is one of great value, and that it realizes a problem, which Baron *Liebig* stated to be one of the great *desiderata* in chemical science. And the bill further alleges, that the statements so contained in these paragraphs are true.

According to the best judgment I am able to form, the facts alleged in these paragraphs would not be evidence to go before a jury, summoned to determine the question whether *James Young* was the first and true inventor. In the first place, they do not, in strictness, express any opinion as to the question, whether the invention had been discovered before Mr. *Young* discovered it; they do, however, express an opinion, that Mr. *Young* was the inventor, and that invention was
very

very valuable; but even if the point at issue had been expressly asserted by them, as it has been, according to the statement contained in the next paragraph of the bill, by Dr. *Lyon Playfair*, I still think that it would not be evidence before a jury. I am of opinion, that though the persons who express their opinion might be called as witnesses, and examined as to the fact that Mr. *Young* was the first and true inventor, their opinions, whether written or oral, that he was such, could not be given in evidence before a jury, without producing the person who had given that opinion, in order that the jury might have the best evidence before them, and thus have the opportunity of ascertaining the means of knowledge of the person expressing this opinion, and of testing the value of it.

The delivery of the medal appears to me to be simply a proof of the deliberate opinion of the jurors, and to be entitled to stand in no higher degree than the expression of that opinion. The allegations in the bill, that the opinions so expressed by these persons were, and are true, is nothing more than an allegation that *James Young* was the first and true inventor, and this is covered by the plea.

The same observations apply to paragraph 14, which states a lecture given by Dr. *Lyon Playfair*, in which he expressed his opinion that Mr. *Young* was the first and true inventor of this process.

The remaining passages of the bill which are not answered are the latter portion of the 15th paragraph, the 16th, and the first part of the 17th, and from the 18th to the 23rd paragraphs, both inclusive. These paragraphs contain allegations that the Defendants are, in fact, using the process discovered by Mr. *Young*, and they

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they set forth the communications between the solicitors of each party, one of which, from the Defendants' solicitor, contains an allegation, that the process used by them is wholly different from that specified in this patent.

I am of opinion, that the facts stated in these paragraphs are not such as could be laid before a jury, on the simple question of whether *James Young* was the first and true inventor. The fact that another person is now using the process patented, is no evidence to show, that the patentee was or was not the first and true inventor; and my opinion is, that the whole of these paragraphs are covered by the plea, and do not require that any answer should be given to them for the purpose of supporting the plea.

Without going through, in detail, the answer given to the paragraphs of the bill numbered from 24 to 27, inclusive, and which answer is to be found in paragraphs 37 to 47, both inclusive of the answer, I am of opinion, that the answer sufficiently answers all such portions of this part of the bill as could be made use of in evidence to negative the plea, and the rest of the bill is answered. No point is made, that the Defendants have not, with sufficient clearness, pointed out to what portion of the bill they have pleaded, and what portion of it they have answered; and the result is, that I think the plea is sufficient, and that it ought to be allowed.

It appeared that on a motion which had been previously made for an injunction, the Court, following its usual practice in such cases, had directed the Plaintiffs, in the first place, to establish their title at law, and directed the Defendants to keep an account. Afterwards

wards and before the trial the Defendants, instead of answering the whole bill, put in the above plea and answer. As to this—

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The MASTER of the ROLLS said,—

In an ordinary case, I should have to stop here, and nothing more would be required than to dispose of the costs of the plea, but in this case, I am of opinion that this is not so. I cannot exclude from my recollection, that in this very case, when the Plaintiffs moved for an injunction, the Defendants disputed their right to the order on two grounds, both that *James Young* was not the first and true inventor, and, secondly, that, if he were, the Defendants had not infringed his patent; and that thereupon this Court made the usual order requiring the Plaintiffs to prove their title at law, where will be open to the Defendants to contest the novelty of the invention, the value of it, and the fact that they have infringed it.

Subsequently, on putting in their answer, the Defendants have thought fit to abandon all issues but one, and to rest their case, solely and exclusively, on the plea, “that the Plaintiff *James Young* is not the first and true inventor.” If there had been no motion for an injunction, if the plea had been submitted to, and the cause had been set down for hearing upon it, this Court would thereupon have simply directed an issue at law, to determine the truth of the plea, viz. was or was not *James Young* the first and true inventor; and if that issue had been found in the affirmative, would have made a decree, granting an injunction against the Defendants, as prayed, as long as the patent should be in force.

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If the Defendants had intended only to dispute the fact alleged by the bill, that they used the process specified in the Plaintiffs' patent, they might have pleaded, that they did not use the process specified in the Plaintiffs' patent. If they had done so, it is obvious, that all those latter paragraphs in the bill relating to the process used by the Defendants, and which, in my opinion, are covered by the present plea, viz. that the Plaintiff *Young* is not the first and true inventor, must have been answered. The Defendants, if they desired to rely on both points, and to raise both these issues, would probably have answered the bill; but they might, I apprehend, have obtained the leave of the Court to plead a double plea, both that the Plaintiff *James Young* was not the first and true inventor, and also, that they, the Defendants, did not employ the process specified in the patent. They have not thought fit to adopt either course, and they have, in equity, rested their case on the question of the novelty of the invention by *James Young*, not disputing its utility, and not disputing that they employ the same process. But at law, this is not so; there, all these defences are open to them, and as the matter now stands, this is a possible, if not a probable result, that the only question discussed at law may be the fact of infringement, and that the Plaintiffs may fail at law, by reason of the want of that discovery in equity, which the Defendants would have been compelled to have given, but for their admission, that the only question between them and the Plaintiffs was the novelty of the invention.

If this should happen, the Court not having interfered to prevent it, the result would be, that the Defendants having succeeded at law on an issue not raised by the pleadings, the Plaintiffs would again be compelled to go to law, under the decree of the Court at the

the hearing of the cause, to contest the fact put in issue by the plea, after much delay and much unnecessary expense had been incurred. It would, I apprehend, be contrary to the practice of this Court, and certainly to good sense and common justice, to allow such a course to take place. The Court has now (which it had not on the hearing of the motion) an opportunity of knowing on what point the Defendants, after due reflection and consideration, are willing to rest their case; and it is the duty of the Court to take care, that time and money are not thrown away in trying what is not in issue between the parties. I shall therefore give an opportunity to the Plaintiffs to call upon the Court, so to rectify the order for a trial already pronounced, as to make it agreeable with what the Court would have done, if, at the hearing of the motion, the plea had been put in, and had been, at that time, either allowed or submitted to.

The order therefore which I think that I ought to make on this occasion, being of opinion that the plea is good, is this:—Allow the plea, and make the costs of it costs in the cause, but the Plaintiffs are to have leave to make such motion as they may be advised, to vary or add to the order of the — day of —, 1853, for the purpose of enabling the Court so to modify the same, as to try the real issue in the suit between the Plaintiffs and Defendants.

NOTE.—An application was subsequently made by the Plaintiffs when the Defendants preferred having the plea overruled without costs (December 13, 1853).

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LAMBARDE v. OLDER.

Nov. 12, 14.

A creditor of an intestate purchased part of the intestate's goods from his administrator. Held, that he could not set off the amount against a debt due to him from the intestate at his decease.

THIS was a suit for the administration of the estate of *Thomas Older*, who died in *October*, 1852, intestate, and indebted to the Plaintiff in the sum of 700*l.*, secured by a judgment entered up in 1826. The intestate's son and daughter having taken out administration to his estate, applied to the Plaintiff to take the farm off their hands, and to take the stock, &c. at a valuation. The Plaintiff consented, and the valuation amounted to about 475*l.* He subsequently purchased several articles at the intestate's sale, amounting to 69*l.* 2*s.* 6*d.* These two sums the Plaintiff sought to set off against the debt of 700*l.* and about 200*l.* arrears of interest due to him by the intestate. The chief clerk allowed the former sum, but not the latter, to be retained by the Plaintiff; and this not being satisfactory, the matter was brought before the Court to be argued.

Some attempt was made to show, that there was an agreement between the parties that there should be a set-off, but the evidence was insufficient to establish it.

Mr. *Fitzhugh*, for the Plaintiff, cited *Freeman v. Lomas* (a); *Jeffs v. Wood* (b); *Mardall v. Thelluson* (c); *Shipman v. Thompson* (d); *Hutchinson v. Sturges* (e); 8 *Vin. Abr.* (f).

Mr.

(a) 9 *Harc.* 109.
 (b) 2 *P. Wms.* 128.
 (c) *Q. B.*, June 18, 1852; and see *Watts v. Rees*, *Exch.*, May 8, 1854.

(d) *Willes*, 103.
 (e) *Willes*, 261.
 (f) Page 562.

Mr. W. D. Lewis, for the Defendant, cited *Pettat v. Ellis* (a); *Cherry v. Boulbee* (b).

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The MASTER of the ROLLS said he would look at the cases.

The MASTER of the ROLLS.

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In this case, the intestate was, at the time of his death, indebted to his landlord in the sum of 700*l.*, and an arrear of interest; and his estate is found to be insufficient for the payment of his debts. Under these circumstances, the landlord took the fixtures, &c., at a valuation of 475*l.*, and he also became the purchaser of part of the goods and chattels of the intestate for a sum of 69*l.* 2*s.* 6*d.* These two sums, or the first, if not the second, he claims to be entitled to have set off against the debt which is due to him, so that his debt may be discharged *pro tanto*. I am of opinion he cannot do so. There is no question but that if he had been indebted to the intestate at the time of his death, the debt might have been set off against any debt due from the intestate to him. But this is not a case of mutual debts, for, in point of fact, a debt due to the legal personal representative is sought to be set off against a debt due from the intestate. Those are debts in totally distinct rights, and cannot, with propriety, be set off one against the other. It is obvious, that the personal representative might have sold these fixtures and the furniture to whomsoever he pleased; and if, upon his selling them to a creditor of the intestate, a right of set-off would have arisen, it would have become

(a) 9 *Ves.* 563.

(b) 4 *Myl. & Cr.* 319.

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become the duty of the executor not to have sold to that person, but to have sold to some one else. In truth, this was property in the hands of the legal personal representative in that character, and if he had wasted it, he would have been liable to his *cestuis que trust*, whether creditors or next of kin, for the misapplication which he might have made of it. If he had sold the chattels to a person knowing him to be insolvent, and had allowed him to take possession, knowing he could not pay for them, he would become personally liable to pay the amount. It is, in point of fact, an attempt to set off a debt due to the legal personal representative against a debt due from the intestate. Now it is obvious, that the same principle would apply to a sale by auction, and that, therefore, no person who was a creditor of the testator could, if this were the law, be allowed to buy at a sale by auction of the testator's effects. Mr. *Fitzhugh* suggested, that the answer was, that the purchaser was supposed to pay at the time, and that, if he were allowed to take away the goods without payment, the executor or administrator must take the consequences. But I dissent from that view, and think that no difference of rights can arise from that circumstance; for if an auctioneer should happen to trust a person who buys at a sale, the fact of his so trusting him will not give him any different rights at law than he would have had before, and if he had any right of set-off, that right would arise immediately upon his becoming the purchaser.

It appears to me, that the only difficulty in this case has arisen from an embarrassment arising from the different forms of action which exist in Courts of Law, which is clearly explained, and the principle as to set-off,

set-off, laid down in the case to which I was referred by Mr. Fitzhugh of *Shipman v. Thompson* (a), which lays down the rule, I am adopting and following, to this effect. If a debt is due to a testator at the time of his death, the executor can only obtain that debt by suing that person in his character of executor; and accordingly, in that suit the debtor to the estate may set off anything which the testator owed to him; but if the debt accrued after the death of the testator, then the executor may either bring the action in his own name, personally, or in his name as executor. The principle is this:—"Where the thing sued for is assets in the hands of the executor before the recovery, or where the cause of action arises in the executor's own time, and never did arise in the testator's, there the executor may bring the action either in his own name or as executor (b)," but in the former case he cannot. If he bring the action in his own name, which is the proper name to bring it in, where the debt arises after the death of the testator, no set-off can be pleaded. But if he brings the action in the character of the executor, a set-off arises from this circumstance, that the executor has, by the improvident form in which he has brought his action, admitted that the right of action accrued during the lifetime of the testator, and consequent upon this admission a right of set-off arises; but if the debt accrued subsequently to the death of the testator, and it is so stated in the pleadings, then no right of set-off arises at all.

Shipman v. Thompson (a) was a very striking case. There the steward of a deceased person had received rents for the testator after his death. The executor sued for those rents

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(a) *Willes*, 103.(b) *Ib.* p. 105.

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rents in his own name and not in his character of executor, and the steward said, "There is an account between me and the testator, and I seek to set off the balance which he owed me against the rents which I have received since his death:" but the Court held (and it has been followed by other cases), that no such right of set-off arose; and for this reason: because the sums paid after the death of the testator were, in point of fact, paid to the steward as the agent of the executor, that they were assets received since the death of the testator, and that as no right of action accrued in respect of them during the lifetime of the testator, so no right of set-off arose. The rule is of course the same whether the legal representative be an administrator or an executor. In the case before me, if the administrator had thought fit to sue Mr. *Lambarde*, he had the option of doing so either in his own name or in his character of administrator. If he had sued him in his own name, no set-off could have been pleaded; if he had sued him in his character of administrator, then by the form of action he would have admitted that the right of action accrued during the lifetime of the testator, and consequently that a right of set-off existed.

I am of opinion, that the administrator ought to have sued in his own name; that the case of *Shipman v. Thompson* is an authority for that proposition; and I am of opinion farther, that if he had not sued in his own name, but in his character of administrator, he would have acted improperly, of which I apprehend this Court would have visited him with the consequences. The fact is, that this is a debt due to the administrator, which debt was contracted by dealing with the executor, purchasing property of the intestate after the decease of the intestate, of which the personal representative

representative was the owner. It is therefore a debt due to him, and which he ought to have sued for as a debt due to him; and as against him, a debt due from the intestate to the purchaser of that property cannot be set-off.

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The consequence is, that I am of opinion that no set-off arises in this case. I am clear there was no agreement between the parties that there should be such a set-off, which would have varied the case; and I am of opinion, therefore, that the whole of this purchase money is assets to be administered in this Court, exactly in the same manner, as if a stranger who had never had any dealings with the testator had bought this property instead of the Plaintiff.

In re BARROW.

Nov. 24, 25.
Dec. 3.

THIS was a Petition by a mortgagor, for the taxation, after payment, of a bill of costs of a mortgagee's solicitor, amounting to 20*l.*, under the following circumstances:—

It requires a very special case to induce the Court to order taxation after payment, the Court being reluctant to open a matter deliberately settled. The rule is, that there must be

In 1846, *Abram*, a pavior, mortgaged some property to *Pendleton* for 300*l.*

In rule is, that there must be

Both pressure and overcharges, or items in the bill itself of such a nature as to amount to what is vaguely called fraud. Definition of the term "fraudulent items."

The doctrine of pressure, in cases of taxation after payment, is not to be extended, and the application for taxation should be made speedily.

Where a mortgagor seeks the taxation of the bill of the mortgagee's solicitor, it must be looked at, not as between the mortgagor and the solicitor, but as between the solicitor and his client, the mortgagee.

Where a considerable portion of a bill of costs is for business, which, in the exercise of an honest and fair discretion, ought never to have been transacted, the Court, although there be no serious amount of pressure, will order a taxation after payment.

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In *October*, 1852, the mortgagor, by his solicitors, proposed to pay off the mortgage, and an account, together with the bill of costs of Mr. *Barrow*, the mortgagee's solicitor, was furnished. This bill, amounting to 23*l.* 7*s.* 7*d.*, being objected to, it was taxed, and 9*l.* 17*s.* 10*d.* were taken off, and, deducting the costs of taxation, the amount due was reduced to 7*l.* 13*s.* 7*d.* Afterwards, on the 18th of *November*, 1852, an offer was made to pay the mortgage and the costs thus taxed, which was refused, and in consequence, notice was given, on the 28th of *December*, to pay off at the end of six months. This expired on the 28th of *June*, 1853, and on an application being then made to pay off, Mr. *Barrow*, on that day, delivered a fresh bill of costs, amounting to 20*l.* This was objected to, Mr. *Barrow* refused to receive it under protest, but offered to receive the amount of the mortgage, retaining the deeds until the amount of the bill could be ascertained and settled.

The bill was paid on the 30th of *June*, and immediately after, Mr. *Barrow* was informed that it would be taxed, and the petition for that purpose was presented within a few weeks.

One-half of the second bill of costs was for proceedings, apparently between the 30th of *October* and the 18th of *November*, in respect of a foreclosure bill which had been prepared but had never been filed: the particular items of which were as follows:—

In Chancery.	<i>Michaelmas</i> , 1852.		
	£	s.	d.
Instructions for Bill to Foreclose	1	13	4
Drawing and Fair Copy Abstract of Title to accom- pany, 8 Brief Sheets	4	0	0
Carriage of Papers	0	1	0
Drawing Bill, folios 10	0	10	0
Fee to Mr. <i>J. B. Allen</i> to settle	1	3	6

	£	s.	d.	1853.
Attending him	0	6	8	
Instructions for Interrogatories	0	13	4	<i>In re</i>
Drawing same	0	6	8	BARROW.
Fee to Mr. J. B. Allen to settle	1	3	6	
Attending him	0	6	8	
Letters and Postage	0	10	0	

These items alone amounted to 10*l.* 14*s.* 8*d.*

Mr. *R. Palmer* and Mr. *Dickinson*, in support of the application. The two circumstances usually required for obtaining a taxation after payment concur in the present case. First, there was a degree of pressure exercised which was irresistible. The mortgagor had already been subjected to a delay of six months by taxing the first bill, and the same result would have occurred, if the mortgagor had delayed the settlement until the second bill had been taxed. It ought also to have been delivered in sufficient time to give an opportunity to the mortgagor to have the amount really due ascertained.

Secondly, there are improper charges to a great extent. The proceedings for foreclosure were perfectly unjustifiable, when it was known that the mortgagor was ready, at any moment, to pay off principal, interest and costs, and when the refusal of the mortgagee to receive it alone prevented the settlement. Besides, it does not appear that Mr. *Barrow* ever received instructions to take that step from his own client.

Mr. *Follett* and Mr. *Kinglake*, *contra*. This is a simple case of payment under protest, without any special circumstances. The payment of a bill is the settlement of an account admitting its correctness, and cannot be opened, unless there be pressure and over-charge

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charge, or overcharges amounting to fraud. As to pressure, there was none, for the mortgagor was at full liberty to tax the bill, no appointment having been made to settle, and if he really intended to pay, he might have applied for the bill in sufficient time to have it examined and taxed; besides this, the Respondent voluntarily offered to let the settlement of the bill stand over, retaining the deeds in the mean time, the possession of which was not required by the mortgagor. It is also to be remembered, that he had the assistance of his own solicitor and was sufficiently protected.

Secondly, as to the overcharges, Mr. *Barrow* and the mortgagor do not stand in the relation of solicitor and client; the transaction is to be examined on the footing of the relations between Mr. *Barrow* and his own client, the mortgagee, and the taxation must take place on the same principle. Every charge that can be sustained as against the mortgagee must be allowed in the taxation at the instance of the mortgagor. What item is there in this bill which the mortgagee would not be bound to pay his solicitor? The proceedings to foreclose were taken with his knowledge and assent, and were rendered necessary by the conduct of the mortgagor, in interfering with the possession of the mortgagee and his tenants. A charge, though improper as between mortgagor and mortgagee, cannot be taxed off, if it be a proper charge as between the mortgagee and his solicitor; overcharge there is none.

Mr. *R. Palmer*, in reply, pressed upon the Court, that the proceeding as to foreclosure was unnecessary and unauthorized by the client, and that it was of such a nature, that even as against the client, it was so improper that it could not be supported; *Re Clark (a)*.

(a) 1 *De G. M. & G.* 43.

That

That the proceeding was vindictive on the part of the solicitor, who now put forward his client, the mortgagee, to screen him from the consequences.

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The following authorities were referred to:—*Re Hubbard* (a); *In re Harding* (b); *In re Deardon* (c); *In re Harrison* (d); *Re Browne* (e); *In re Fyson* (f); *Re Mash* (g); *Re Finch* (h); *In re Massey* (i).

The MASTER of the ROLLS reserved his judgment.

The MASTER of the ROLLS.

December 3.

This is an application to tax a solicitor's bill, amounting to the sum of 20*l.*, after payment. It requires a very special case to induce the Court to make such an order. The cases are very numerous on the subject, and it may be said, that they lay down as the rule, that there must be pressure on the person paying, and overcharges in the bill, or else that there should be items in the bill itself, of such a nature as to amount to what is somewhat vaguely called fraud.

The circumstances of this case are somewhat peculiar:—In the month of *December*, 1846, *Henry Abram*, a pavior at *Liverpool*, had mortgaged two houses at *Liverpool*, let to monthly tenants, to *John Pendleton*, a watch-movement manufacturer at *Prescot*, for the sum of 300*l.* The interest was irregularly paid, and the property

(a) 15 *Beav.* 251.

(b) 10 *Beav.* 250.

(c) *Exchequer*, Nov. 8, 1852.

(d) 10 *Beav.* 57.

(e) 15 *Beav.* 61; 1 *De G. M. & G.* 322.

(f) 9 *Beav.* 117.

(g) 15 *Beav.* 83.

(h) 16 *Beav.* 585, and *Lords Justices*, May 9, 1853.

(i) 8 *Beav.* 458.

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property was not more than a security for the principal amount charged.

In the month of *October*, 1852, the mortgagor had employed Messrs. *Stockley* and *Thompson*, as his solicitors, to pay off the mortgage. They applied to the mortgagee and his solicitor, Mr. *Barrow*, who expressed Mr. *Pendleton's* willingness to be paid off. The account was rendered, and the bill of costs of Mr. *Barrow*, the mortgagee's solicitor, was delivered at the same time, and which amounted to the sum of 23*l.* 7*s.* 7*d.* The mortgagor's solicitor took exceptions to this bill, and referred it to taxation, the result of which was, that more than one-sixth of it was taxed off. When the amount due on the bill had been ascertained by taxation, and in *November*, 1852, the solicitors of the mortgagor wrote to Mr. *Barrow* and proposed then to pay the amount due for principal and interest and the costs so taxed. On the 18th of *November*, Mr. *Barrow* writes a letter expressing his willingness to receive his own costs, but putting the mortgagor at arms length. It is to this effect:—" *Re Abram*. I shall be ready, at any time, to receive the costs herein, when you may please to pay them. As to anything further in respect of this person, I am sorry that, owing to his own improper course of conduct, I do not feel at liberty to say anything on behalf of the mortgagee to you."

The mortgagee, in the same month, refused to receive his principal and interest which was offered to him, and the result was, that notice of an assignment of the equity of redemption to the Petitioner and of an intention to pay off the mortgage was served on the Petitioner on the 28th of *December*, 1852, which notice expired on the 28th of *June*, 1853. On then applying to pay off the mortgage, a fresh bill for 20*l.* is delivered by Mr. *Barrow*, the mortgagee's

mortgagee's solicitor. This bill is proposed to be paid under protest. Mr. *Barrow* refuses so to receive it; he offers to take the principal and interest due on the mortgage, and to retain the deeds until the amount on the bill can be ascertained or settled. This is refused, and ultimately the bill is paid on the 30th of *June*, 1863, the protest having been withdrawn, although after payment, Mr. *Barrow* is informed, that it is the intention of the mortgagor to tax the bill.

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*In re*  
**BARROW.**

There was, in my opinion, sufficient time to ascertain and consider the objections to the bill before it was paid. In fact, the bill is not only a short one, but it is evident, that the whole of the objections to the bill were well understood before the bill was paid. Nor does there, in my opinion, exist, in this case, what can properly be called pressure. In coming, therefore, to the conclusion which I have arrived at, that it is my duty to make an order for taxation, I have done so mainly upon consideration of the items contained in this bill, connected, as they are, with the other circumstances of the case. I think it desirable to state this distinctly, in order that if, as is probable, this case should go further, the grounds on which I proceed may be clearly understood, and that I may not be supposed to be infringing on the rule I have hitherto followed, with relation to taxation after payment. The items which have principally influenced me are items to this effect.

"To taking instructions, &c., to file a bill of foreclosure." [*His Honor stated the items, which amounted to 10*l.* 14*s.* 8*d.* (a)*]

In order to form a just opinion respecting the costs

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(a) See *ante*, p. 548.

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so incurred, it is necessary to recur to the situation of the parties, during the time when this bill of foreclosure must have been prepared. In *October*, 1852, the mortgagee, Mr. *Pendleton*, under the advice of Mr. *Barrow*, was willing to receive his principal, interest and costs; the payment is delayed by the taxation of Mr. *Barrow's* first bill; at this time there was no arrear of interest due to the mortgagee; on the contrary, the mortgagee had distrained and received a sum in advance, beyond the interest due. The evidence convinces me, that he and his solicitor not only had reason to believe, but that they did believe, that the money was ready to pay him off. The date of the preparation of the bill of foreclosure is not given in the bill of costs, more precisely than "*Michaelmas*, 1852," but the items occur in the bill between the 2nd and the 18th of *November*, 1852; and the affidavit of Mr. *Barrow* says, that instructions were given at once, in consequence of Mr. *Abram's* conduct in distraining on the 30th of *October*. It was therefore pending these transactions, certainly after the order to tax the first bill was obtained, and probably during its taxation, that instructions are given to prepare a bill of foreclosure, which was never filed, and which I cannot ascertain that it was intended to file, and an expense of half the bill, between 10*l.* and 11*l.*, is incurred in so doing.

The reasons given in the affidavits for this proceeding are wholly unsatisfactory. They are, that the mortgagor was interfering with the rights of the mortgagee, and opposing his authority and proceedings. The rights so interfered with were these:—Mr. *Pendleton* had been paid his full interest due up to the last day of payment; there was no arrear, and nothing due to him in respect of interest. At that time, also, it is but reasonable to suppose, he intended to refuse, as he did

did a few weeks afterwards actually refuse, to receive the principal and interest due to him; he had thought proper to give notice to the tenants to pay their rents to him, and he had, against the wish and in spite of the opposition of the mortgagor, received 10*s.* 5*d.* from one of the tenants, on the 18th of *October*, and 10*l.* 10*s.* on the 19th or 20th of that month, although, as I repeat, nothing was due for interest at that time; all this being after the letter of the 13th of *October*, informing Mr. *Barrow* that his bill would be taxed. Mr. *Abram*, the mortgagor, resists this proceeding with the tenants, and distrains on the tenants.

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This is the account given of this transaction by Mr. *Barrow*. "On the 18th of *October*, I had, against the opposition of *Henry Abram*, received from the tenant 10*s.* 5*d.* for rent, being the first sum of any kind I received on account of the said interest; and on the 30th of the same month, *Abram* distrained on the said tenant for the said rent so paid by him, and notwithstanding the threats and remonstrances of the tenant, he enforced payment of the said rent, as he also, in like manner, did, on two subsequent occasions, namely, in the months of *November* and *December* following, though the mortgagee was still in the receipt of the rents." He continues, "In consequence of the said distress by *Abram*, on the 30th of *October*, I at once submitted instructions to Counsel to prepare a bill or other proceedings in Chancery, as circumstances might justify, in order to enforce and protect the rights of the mortgagee."

It is not alleged, that these costs were incurred because the mortgagee thought that his mortgage money was in peril, nor if so alleged could it be true, consistently with the facts admitted, to which I have already adverted. On the contrary, Mr. *Pendleton*, in his second affidavit,

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affidavit, says, "That on the second proposal to pay off the mortgage without notice being made to me, I did not, for various reasons, feel disposed to receive the same, mainly in consequence of the said *Henry Abram's* misconduct in resisting my powers as mortgagee, as already stated, and for other reasons connected with the said *Henry Abram*; and accordingly, my solicitor wrote to Messrs. *Stockley* and *Thompson*, in answer to their letter, that owing to the misconduct of *Henry Abram*, my solicitor was not at liberty to say anything on my behalf relating to *Abram*."

These are certainly not sufficient reasons to justify the taking of such a step as the preparation of the bill of foreclosure, and I am compelled reluctantly to come to the conclusion, that an ingredient in the incurring of these costs was, a desire to prove to the mortgagor what a foolish and inexpedient proceeding it was, to take so hostile a step as to tax the bill of costs of the mortgagee's solicitor. It is true, that the bill of costs and the items themselves are inconsiderable in amount, but it is of the greatest importance, that this Court should protect a client from costs wantonly and wholly unnecessarily incurred.

I have already stated, that in my opinion, the expression used in these cases of "items being fraudulent," is vague; and it is undoubtedly difficult to define, accurately, the costs which should come within the description of those which should be sufficient to induce this Court to tax a bill after payment.

In the ordinary sense of the words, these items may not be fraudulent, but I understand the expressions and judgments of Lord *Langdale*, in the reported cases, to mean this:—that if business be transacted *bonâ fide*,  
with

with a view to benefit his client, the items detailing it cannot be considered fraudulent, even though they be overcharged in the bill of costs, but that if it appear that the bill of costs, or a large portion of it, is for business, which, in the exercise of an honest and fair discretion, ought never to have been transacted at all, then that such items come within the class of items which will induce this Court to tax a bill, even though there was no serious amount of pressure at the time when the bill was paid.

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**BARROW.**

It is urged, no doubt correctly, that I must look at **this** bill, not as a bill between Mr. *Barrow* and the mortgagor, but as a bill between Mr. *Barrow* and his own client, Mr. *Pendleton*, the mortgagee, and further, that it appears by the evidence, that the mortgagee expressly sanctioned and directed Mr. *Barrow* to take **this** step and to incur these costs; and then, it is contended, that although this might be an item to be disallowed, in taking the account between the mortgagor and mortgagee, still, as between the mortgagee and Mr. *Barrow*, he is liable to pay this amount to Mr. *Barrow*, and that, therefore, the mortgagor must be so liable in **this** proceeding.

Admitting the premises, I differ with the conclusion. In the observations I have made, I have treated and considered the bill in this light, viz. whether Mr. *Barrow* could compel Mr. *Pendleton*, his client, to pay it, upon the assumption that he, from any circumstances, such as the insufficiency of the property, had been unable to obtain the amount due to him from the mortgagor. I am of opinion that the mortgagee, Mr. *Pendleton*, could not have been so compelled. I concur with the decision *In re Clark* (a), and I am of opinion, that in taxing bills of costs, these costs of proceedings, which

(a) 1 De G., Macn. & G. 43.

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which it is impossible that the client could have directed his solicitor to take, if he had received proper advice from his solicitor, ought to be disallowed. I consider, therefore, here, whether Mr. *Pendleton* could, if Mr. *Barrow* had properly instructed and advised him as to his position, have directed such proceedings to have been taken, and I am of opinion that he could not.

But the case does not rest here ; nothing can be more vague or unsatisfactory than the affidavits on the subject of the instructions said to have been given to Mr. *Barrow* to take these proceedings. The time specified is immediately after the 30th of *October*, 1852. Mr. *Barrow* says that he did it "*at once*," in consequence of *Abram* having distrained. No interview with Mr. *Pendleton* is mentioned previously; nor does the expression in Mr. *Barrow's* affidavit allege or imply, that he took such instruction from Mr. *Pendleton*. The bill of costs does not contain one entry of attendance upon the mortgagee for this purpose, and the words of Mr. *Pendleton's* affidavit are not that he directed such proceedings to be taken, but that they were taken with his "knowledge and authority." The words are these:— "*Abram* was again behind with his interest in *June*, 1852, and as I did not feel satisfied to allow the interest to accumulate, my solicitor, by my wish, took steps to obtain the same, at first, principally by writing to and calling upon the said *Henry Abram*, but without success; afterwards, by serving the tenant, Mr. *Bentham*, with notice to pay his rent to an agent on my behalf, and as the interest was still not paid, and no rent forthcoming from the tenant, by finally distraining on *Abram*, in respect of the house occupied by him; and again, on the next half year's interest becoming due, it was necessary to proceed to make another distress, but which was not accomplished, and also pending the before-mentioned events

events and proceedings, it became necessary, owing to the opposition of *Abram* to my authority as mortgagee, by enforcing rent from the tenant after he had paid the same or was liable to do so to myself, to institute proceedings against the said *Henry Abram* in the Court of Chancery, for the protection and enforcement of my rights as mortgagee." He proceeds to say, that all the acts and proceedings of his solicitor were taken "not only of my general authority and retainer, but also with my special knowledge and authority on the occasions, and for my interest and safety; the receipt of the rent and distresses, in consequence of his refusal to pay the interest, and the proceedings or bill in Chancery, in consequence of *Abram's* opposition to the reasonable exercise of my powers and authority as mortgagee."

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In re  
BARROW.

The person who makes this affidavit seems to be a tradesman residing at *Prescot*, who acted throughout under the advice of his solicitor, and only as he directed.

The question is, whether payment ought, in these circumstances, to preclude the taxation of this bill? No doubt payment is a most material ingredient in these cases. This Court is always reluctant to open a matter deliberately settled between the parties to the transaction. Payment assumes that the matter is settled between the parties, and the solicitor, so treating it, naturally takes less care of his vouchers and evidence; although no particular inconvenience can be alleged by *Mr. Barrow* in this case, inasmuch as he was informed, immediately after the settlement, that the bill would be taxed, and the petition for that purpose was presented in the course of a few weeks after the transaction occurred. If the Court were to refuse taxation in such a case as the present, it appears to me that it would put a mortgagor entirely at the mercy of the solicitor of his mortgagee

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gagee. In this case, for instance, what course could the mortgagor have adopted? if he had adopted the offer of Mr. *Barrow* and paid the principal and interest of the debt, without getting the title deeds, he might have been put to expensive proceedings before they could have been recovered. If he had adopted the course he took in *October*, 1852, and applied for an order to tax Mr. *Barrow's* bill, the same course might have been repeated, and a fresh bill of costs brought in again at the end of six further months, together with the unavoidable imputation, that, in truth, his money was not ready, and that he was adopting these steps for the purpose of delay.

I certainly have shown no disposition to open a settled account, or to refer to taxation the bill of a solicitor once paid. I have thought that the doctrine of pressure ought not to be extended, and that, without it, mere overcharges, even though gross, which the client might have detected before payment, should not induce the Court to take this course, and, above all, I have considered, that it is incumbent on the Petitioner to come speedily; but when I find a bill containing a series of items which, in my opinion, are not mere overcharges, but charges for a whole class of business which ought never to have been done at all, the case appears to me to fall within the principle laid down by Lord *Langdale*, when he said, that the nature of the items might be such as to require this Court to direct the taxation of the bill.

I shall, therefore, in this case, make the usual order for taxation.

NOTE.—The result of this taxation is instructive. The bill was reduced from 21*l.* 16*s.* 3*d.* to 2*l.* 7*s.* The costs of the taxation, which, under the usual order, included the costs of the petition to the Court, amounted to 59*l.* 2*s.* 4*d.*, so that the solicitor had to pay 56*l.* 15*s.* 4*d.* and to refund 20*l.*, in addition to bearing his own costs of the proceedings.

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JOHNSON v. COPE.

December 5.

GUY PHILLIPS, the testator in the cause, by his will dated in 1825, gave all his personal estate to his executors, in trust to pay the interest thereof to his brother, *Abraham Phillips*, and his two sisters, *Mary Phillips* and *Jane Eldershaw*, and the survivors and survivor of them for life; and after the decease of the survivor to divide his said personal estate amongst "all and every the six several children of his late sister *Anne Johnson*, deceased, that is to say, *James Johnson*, &c. (naming them), who shall be respectively living at the time of my decease, and the issue of such of them as shall be living at the time of my decease, and the issue of such of them as shall have then departed this life, leaving issue then living; but so and in such manner, that the issue of any or either of the children of my late sister *Anne Johnson*" shall take only such part or share as their respective parents "would have taken if then living;" the shares of sons to be vested at twenty-one and the daughters at twenty-one or marriage. And the testator directed, that "if any or either of the six several children of his sister *Anne Johnson* should depart this life without leaving lawful issue him, her or them surviving, the part or share of him, her or them so dying without issue should go and accrue to the survivors or survivor, or others or other of such

A testator gave his personal estate to *A.* for life, and after the decease of *A.*, he directed his executors to divide it among the six children of his late sister *A. J.* (naming them) "who should be living at the time of his decease, and the issue of such of them as should be living at the time of his decease, and the issue of such of them as should then be dead leaving issue then living, the issue to take only such part or share as their parents, if then living, would have taken." If any of the children should die without leaving issue, his or her share was to go over to the others; and if any of the children should die leaving issue, they were to take as therein mentioned. All the six children of *A. J.* survived the testator and the tenant for life, and some of them had issue. Held, that the six children were entitled to the fund absolutely, and that, in the events which had happened, their issue took nothing.

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such six children, to be equally divided between them ; and in case of the death of any or either of the said six children of his sister *Anne Johnson*, leaving lawful issue him, her or them respectively surviving, his executors should lay out and invest the share or shares of the issue respectively of the said six children in the purchase of stock for the security and benefit of such issue respectively." Then followed a provision for the maintenance, education and advancement of the issue till their shares should become vested.

The testator died on the 6th of *January*, 1826, leaving his brothers and two sisters, the tenants for life, him surviving, the survivor of whom died in *January*, 1853.

The six children of *Anne Johnson* were all still living. Three of them were Plaintiffs and had never had issue ; the other three were Defendants, and had issue, some of whom were born in the lifetime of the testator, others since, but all before the death of the surviving tenant for life. Some of these died before the death of the surviving tenant for life and some were now living.

The question was, what interests the children of *Anne Johnson* and their issue took under the will ?

Mr. *E. F. Smith*, for the Plaintiffs. The question is, whether the children of *Anne Johnson* take absolutely or for life, with remainder to their issue. On the authorities, the fair construction appears to be, that the property is divisible into six shares ; and though difficulties may exist from the repetition of the words in the will, still the issue are issue of the parties named and take by substitution only in the event of their parents dying in the lifetime of the tenant for life, and the period for determining the distribution is, at all events, the death of the surviving tenant for life. The issue are only to take their

their parents' share, and that proviso immediately follows the gift. The six children are all now living, and therefore take the whole. At all events, the Plaintiffs who have no issue are entitled to their shares absolutely. *Pearson v. Stephen* (a); *Ellison v. Airey* (b); *Doody v. Higgins* (c).

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Mr. C. P. Phillips, for the three Defendants in the same interest as the Plaintiffs, cited *Butter v. Ommoney* (d); *Salisbury v. Petty* (e); *Sibley v. Perry* (f); *Crozier v. Fisher* (g).

Mr. Murray, for the issue of the children born in the testator's lifetime and living at the death of the survivor of the tenants for life. As the bequest is to children and their issue, and there was issue of the children then living, the word "issue" must mean "children," that is, children of the children of *Anne Johnson*, and it is therefore a gift *per capita*. All the six children were living at the death of the last tenant for life, and some of them had children then who are now living; and as these possess all the qualifications required by the will, the fund ought to be divided *per capita* between the six children of *Anne Johnson* and their children born before the death of the testator; *Baker v. Baker* (h).

Mr. T. C. Wright, for the issue of the children born since the testator's death and now living.

Mr. Fleming, for the trustees and for the issue of the children who died in the lifetime of the tenants for life.

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| (a) 5 <i>Bligh</i> (N. S.), 203; 2 | (e) 3 <i>Hare</i> , 86. |
| <i>Dow. & Cl.</i> 328. | (f) 7 <i>Ves.</i> 522. |
| (b) 1 <i>Ves. sen.</i> 111. | (g) 4 <i>Russ.</i> 398. |
| (c) 9 <i>Hare</i> , App. 32. | (h) 6 <i>Hare</i> , 269. |
| (d) 4 <i>Russ.</i> 70. | |

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The following cases were cited:—*Ayton v. Ayton* (a); *Tribe v. Newland* (b); *Bouverie v. Bouverie* (c); *Heron v. Stokes* (d); *Cunningham v. Murray* (e); *Edwards v. Edwards* (f); *Brett v. Horton* (g); *Burrell v. Baskerfield* (h).

The MASTER of the ROLLS.

This is an inartificially drawn will, but I do not think there is much difficulty in the construction of it. I am of opinion, that the fund is divisible immediately into six parts, and that the six children of *Anne Johnson*, having all survived the last surviving tenant for life, whose death was the period for distribution, take the property absolutely amongst them. There is no necessity for striking out any words of the will, nor has any been suggested in the argument. The meaning of the testator is this:—"I give the property to the six children of *Anne Johnson*, and I give it both to the issue of those children who shall be living at my decease, and the issue of those who shall have died before me leaving issue, that is to say, in such manner, that with respect to those who shall have died before me leaving issue, the issue are to take their parents' share; and with respect to the issue of those who shall survive me, they are to take the parent's share, in case their parent should die before the last tenant for life, which is the period of distribution, and if not, then the parents themselves shall take the whole of their respective shares."

The subsequent clauses are all, in my opinion, reconcilable

(a) 1 *Cox*, 327.

(b) 5 *De G. & Sm.* 236.

(c) 2 *Phill.* 349.

(d) 2 *Dr. & War.* 89.

(e) 1 *De G. & Sm.* 366.

(f) 15 *Beav.* 357.

(g) 4 *Beav.* 239.

(h) 11 *Beav.* 525.

cible with this construction. There are three classes mentioned by the testator as objects of his bounty : first, the children of his sister *Anne Johnson*, secondly, the children of such of the six as should be living at the time of his decease, and lastly, the children of such of them as should be then dead leaving issue then living. In making provision for the latter two classes, the testator, in what follows, transposes them, and directs that the issue of such of the six children as shall be dead shall take such parts or shares, as their parents would have taken if then living; and then, after interposing a gift over to the other children of *Anne Johnson*, in case any of them should die without leaving issue, he directs in what manner the second class, namely, the issue of such of the six children of *Anne Johnson* as should be living at the time of his decease, was to enjoy the bounty provided for them.

On the whole I think, that all the provisions have reference to the period of distribution, and that the testator intended to give interests, either vested or contingent, to all the issue of such of the six children as might die either in his own lifetime or after his death before the period of distribution; but that if all the six children should survive the period of distribution, they were to take the property absolutely and their issue nothing.

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JERVOISE v. JERVOISE.

December 5.

Old family
jewels do not
constitute *para-*
phernalia.

Pearl orna-
ments pre-
sented to a
married wo-
man by a third
party, held to
be part of her
paraphernalia.

So, likewise,
brilliant brace-
lets bought by
the husband
and given to
the wife,
though worn
with the family
jewels, consti-
tute part of her
paraphernalia.

A husband,
who was enti-
tled to family
jewels and dia-
monds, be-
queathed to
his wife all
"his" jewels
for life, and
afterwards as
heir-looms.

Held, that this
bequest did not
include pearl
ornaments
presented to
her, or bril-
liant bracelets
bought by the
husband and
given to the
wife, and worn
with the family
jewels, so as to
put the wife to
her election.

IN 1799, the Plaintiff, *Dame Elizabeth Clarke Jer-*
voise, intermarried with the Rev. *Samuel Clarke*;
she was then entitled to some small separate property,
besides a jointure, secured to her by her marriage set-
tlement.

At the time of the marriage, Mr. *Clarke* was entitled
to certain jewels, including diamonds, which it was
believed came to him from his maternal relations. He
subsequently became entitled (as was supposed) to other
jewels, as residuary legatee, under the will of his father,
who died in *January*, 1808.

On the 9th of *November*, 1808, Mr. *Clarke* took the
surname of *Jervoise*, and in 1813 he was created a
Baronet.

Soon after the marriage of the Plaintiff, Miss *Ann*
Clarke (her husband's aunt) made her a present of an
old fashioned set of pearl ornaments, which she had
reset, and she paid the expense of resetting out of
her own separate money. Her husband also ordered
a brilliant bracelet, and shortly after its purchase,
he observed to her, that he thought the other arm
looked jealous, and he would order a second bracelet,
which he accordingly did, and paid for the two out of
his own money. The Plaintiff was in the habit, from
time to time afterwards, of wearing the two bracelets
with her husband's jewels, at Court and elsewhere, but
the bracelets more frequently alone, inasmuch as she
wore

wore them at ordinary parties ; while she wore the other jewels at Court only and on other full-dress occasions.

1853.

JERVOISE
 v.
JERVOISE.

In 1837, the Plaintiff and her husband ceased to reside in their house in *Hanover Square*, and commenced travelling about from place to place; and at the Plaintiff's request, her husband deposited the set of pearls and the two brilliant bracelets, together with the greater part of the other jewels, at his banker's, for safe custody, where they remained till his death. In *May*, 1852, the Plaintiff and her husband came to town, and one day, while residing at their house in *Hanover Square*, her husband (as she by her affidavit stated) came into her room and said to her, "I shall give you the diamond bracelets," and thereupon threw down before her, for the purpose, as she believed, of her taking it up and keeping it, a paper writing, as follows :—

	£	s.	d.
P ^d . Brilliant Bracelets 25 Colletts each. . . .	465	0	0
Less 4 Brilliants taken from each	54	0	0
	411	0	0
	20	11	0
	390	9	0

P^d. *Rundell* for Bracelets for Lady C. J.

S. C. J.

The words "P^d. *Rundell* for bracelets for Lady C. J. —S. C. J.," the Plaintiff stated, were in the handwriting of her husband.

The present baronet, the eldest son, and one of the executors of his father, the Rev. Sir *Samuel Clarke Jervoise*, in his affidavit stated, that he had found the following entry in his father's bank-book :—"1813, *Mch*. 30, *Rundell*, 390*l*. 9*s*," which he believed related to the purchase from *Rundell & Co.* of the bracelets.

By

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 v.
 JERVOISE.

By his will, bearing date in 1844, Sir *Samuel Clarke Jervoise*, gave the Plaintiff 1,000*l.* and his carriages and carriage horses, and saddle horses, if any; also the use, during her life, of 1,000 ounces of such of his plate as she might select; *also the use, during her life, of all his jewels*, and an annuity of 2,700*l.*, in addition to the jointure secured to her. The testator then devised all his real estates to trustees, to the use of his eldest son, the Defendant, Sir *Jervoise Clarke Jervoise*, for life, with remainders over in strict settlement, and he bequeathed all his pictures and prints, and also his plate and jewels (subject to the rights and powers thereby given to the Plaintiff), to his trustees, upon trust, that the same might go along and be held and enjoyed with the freehold hereditaments thereinbefore devised, by the person or persons who, for the time being, under the limitations thereinbefore contained, should be entitled to the possession or the receipt of the rents and profits of the same hereditaments, in the nature of heir-looms. On the death of the testator, in *October*, 1852, the Plaintiff claimed not only the use, for life, of the two brilliant bracelets and the pearl ornaments, but to be entitled to them as her own absolute property; and this claim was filed, to have the opinion of the Court on that question.

Mr. *Glasse* and Mr. *C. Hall*, for the Plaintiff. It is absolutely necessary that the Plaintiff's rights should now be determined, for where a husband bequeaths his wife's jewels to her for life, with remainder over, and the wife makes no election or claim to have the jewels as her *paraphernalia*, her administrator cannot make such a claim; *Clarges v. Earl of Albermarle* (a). As to the two brilliant bracelets, the case is clear, for the testator

(a) 2 *Vern.* 247; *Nel. Ch. Rep.* 174.

tator gave them to his wife, during the coverture, and she was in the habit of wearing them ever after. They are therefore her own separate property; *Northey v. Northey* (a); and the custody or possession of them by the husband does not alter the rights of the wife, if she has worn them as ornaments on all usual occasions. Nor is the wife debarred of her *paraphernalia* by the bequest to her for life of the use of all the husband's plate, jewels, &c.; *Marshall v. Blew* (b).

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As to the pearl ornaments, they clearly belong absolutely to the Plaintiff, for they were given to her by Miss *Clarke*, and were reset at the expense of the Plaintiff's separate estate.

Mr. *Haynes*, for the Defendants, the trustees. There are three classes of jewels to be here considered; first, the family jewels and diamonds, which came to the testator by descent or by will; secondly, the pearl ornaments, which were given to Lady *Jervoise* by a stranger or third party; and lastly, the brilliant bracelets, purchased by the testator, and worn by the Plaintiff. As to the pearl ornaments, they were given by a stranger, and are therefore to be considered as given for the separate use of the Plaintiff. But the brilliant bracelets were purchased by the testator, and intended to be worn, and were worn at Court with and as an accretion to the family jewels and diamonds. The decision, therefore, whatever it may be, as to the one, must govern the other. Now the brilliant diamonds are clearly the wife's *paraphernalia*, and the family jewels and diamonds are equally so, and but for the will, they would have gone to her. But the will gives her the use of "my jewels" for life, and subject thereto, it gives them to

(a) 2 *Atk.* 77; 9 *Mod.* 270.

(b) 2 *Atk.* 217.

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to the trustees, upon trust to be enjoyed as heir-looms. The word "my" determines the question, and puts the wife to her election; *Shuttleworth v. Greaves* (a). The jewels and diamonds being expressly given to the wife to be worn as ornaments, and being all placed together indiscriminately in boxes, at the bankers, they are to be considered as her *paraphernalia*; *Graham v. Lord Londonderry* (b). In the case, indeed, of *Calmady v. Calmady* (c) a distinction appears to be taken between family jewels and those purchased by the husband; but supposing that no such difference exists, the question is, whether the surrounding circumstances do not show, that the testator intended the one to go with the other. They are both, therefore, the widow's *paraphernalia*, and she is put to her election, between them and the benefits she takes under the will.

Mr. Glasse, in reply. The bracelets came into the family in 1813, when the testator was created a baronet. He got them expressly for the adornment of his wife, and presented them, and the receipt for them, to her. If family jewels were considered the *paraphernalia* of each successive wife in a family, there could be no such thing as family jewels at all.

The MASTER of the ROLLS.

I am of opinion, that the family jewels were not the *paraphernalia* of the wife. I shall follow *Calmady v. Calmady*, which accurately expresses the law upon the subject. Old family jewels, which have been handed down from father to son, cannot constitute the *paraphernalia* of the wife, and unless she acquires them by
 gift

(a) 4 Myl. & Cr. 35. (b) 3 Atk. 393. (c) 11 Vin. Abr. 181, pl. 21.

gift or bequest, she cannot claim them as a wife's *paraphernalia*.

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The same rule does not apply to the jewels acquired during coverture, or given to her by her husband during coverture, for the purpose of wearing them as befitting her station in life. These are properly *paraphernalia*. I think, in this case, that the diamonds, which are called the grandfather's diamonds, must not be treated as the wife's *paraphernalia*, but that the pearl ornaments clearly are so. The grandfather's diamonds are consequently enough for the will, giving her the use "of all his jewels" for life, to operate upon.

With regard to the bracelets which are made up of these brilliants, I think they must be treated as *paraphernalia* of the wife. They have been acquired during the coverture, and the husband evidently bought them for the purpose of adorning his wife, and she constantly made use of them. It does not appear that they were bought to form a portion of or to be connected with the old family jewels, though, no doubt, they might, very probably, have been bought for the purpose of being used or worn with them. In *Calmady v. Calmady*, the diamonds could only be separated by breaking up the whole ornament, which had been so constructed, that the ornament itself was increased and enlarged by fresh brilliants being added to it, and therefore, in one sense, might it be deemed the same. That is distinct from a fresh and separate ornament, so constructed that it may be worn either separately or conjointly with the other ornament.

I must therefore hold, that the brilliant bracelets and pearl ornaments are the property of Lady *Jervoise*, but that the grandfather's diamonds were not,
and

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and that though she was entitled to the use of them during her life, under the trusts of the will, no case of election arises. The costs must be paid out of the estate.

HORLOCK v. SMITH.

December 14.

The tenant for life under a settlement voluntarily expended monies in erecting necessary buildings on the trust property. He also paid the expenses of the investment of the trust funds in land. Held, that his executors could not set off this outlay as a satisfaction *pro tanto* of a covenant, on his part, to pay 3,000*l.* to the trustees of the settlement.

BY the settlement made on the marriage of Mr. and Mrs. *Smith*, in 1840, Mr. *Smith* covenanted to pay the trustees 3,000*l.*, which sum, together with a mortgage debt of 17,000*l.* was to be held by them upon trust for the husband, wife and children successively. The settlement contained a power for the trustees, at the request, in writing, of Mr. and Mrs. *Smith*, to invest this money in the purchase of freehold or copyhold estates. In 1843, 1844 and 1845, the trustees, on such written request, called in the mortgage debt of 17,000*l.*, and invested the produce in the purchase of an adjacent estate.

Mr. *Smith* died in 1847, without having paid the 3,000*l.* to the trustees of the settlement; and by this bill his widow, who had since married Mr. *Horlock*, prayed to have the 3,000*l.* paid out of his assets.

The executors of Mr. *Smith*, by their affidavit, stated, that the testator had expended 2,329*l.*, out of his own monies, in erecting farmhouses and buildings on the purchased estate, which previous thereto was "destitute of the usual houses or buildings necessary for the convenient occupation of such farms, and that there were not any houses in the neighbourhood, which could be conveniently occupied by the tenants of such farms; and it would, therefore, have been difficult, if not impossible, to

to let such farms to any advantage, unless such buildings had been erected." They also stated, that the erection of such farm buildings had been an essential and permanent improvement to the said lands, and had increased the income derivable therefrom. They further stated, that the costs, charges and expenses of and incidental to the conveyance of the lands so purchased to the trustees of the settlement, amounted to 389*l.*, which sum was paid by Mr. *Smith* out of his own monies. They therefore claimed a right to set off 2,329*l.* and 389*l.* so expended, against the liability under the covenant. There was proof of declarations of the testator, that he intended, in the settlement of his covenant for payment of 3,000*l.*, to credit himself with the sums so expended.

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Mr. *Roupell*, Mr. *Elmsley* and Mr. *Hobhouse*, for the Plaintiffs, argued, that the payments in question, having been voluntarily made by the tenant for life, without the sanction of the trustees, could not be recovered, either from the trustees, or as against the trust fund.

Mr. *Welford*, for the children. There was no consent in writing of the wife to the payments by the husband, and therefore they cannot be considered as investments in pursuance of the power.

Mr. *Lloyd*, Mr. *R. Palmer* and Mr. *Karslake*, for the executors of Mr. *Smith*. It is proved that the outlay formed "an essential and permanent improvement" to the estate, which was destitute of necessary buildings, and without which the farms could not have been let. The money expended may, therefore, be properly considered as an investment of the trust funds in land, under the power. It is such an outlay as the Court itself, if applied

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lied to, would have sanctioned. If any doubt exists, an inquiry may be directed, as was done in *Hibbert v. Cooke* (a), whether it was for the benefit of the parties interested, that the buildings should be erected. But here, the outlay was made with the knowledge, privity and concurrence of the Plaintiff, Mrs. *Horlock*, and she therefore is bound by the encouragement she gave to the expenditure; *Short v. Taylor* (b); *Williams v. Earl of Jersey* (c). It would be inequitable for her to take the benefit of the farm buildings, without contributing to the expense of their erection. This Court, at least, will afford her no assistance, except on the terms of her doing equity; and in all cases where the Court interferes, in setting aside leases or conveyances, or in granting relief as against a mortgagee in possession, it always directs an allowance to be made to the Defendant for permanent and lasting improvements; *Graves v. Graves* (d); *Neesom v. Clarkson* (e). This differs from the case of a tenant for life voluntarily laying out money in improving the inheritance, for here he had trust monies in his hands for that purpose, *Caldecott v. Brown* (f); *Hibbert v. Cooke*; *Nairn v. Marjoribanks* (g); and it is shown that it was never his intention to make a present of the money so expended by him.

As to the costs, they were necessarily a charge on the trust funds, and none existed, except the 3,000*l.* in the hands of the testator, which could then be resorted to for that purpose. The settlement authorizes the trustees, out of the monies in their hands, to retain all costs, charges and expenses which they might sustain
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(a) 1 <i>Sim. & Stu.</i> 552.	(d) Cited 1 <i>Sim. & Stu.</i> 553.
(b) Cited in 2 <i>Eq. Ca. Abr.</i> 522.	(e) 4 <i>Hare</i> , 97.
(c) <i>Craig & P.</i> 91.	(f) 2 <i>Hare</i> , 144.
	(g) 3 <i>Russ.</i> 582.

in and about the execution of the trusts. The trustees, therefore, would have a right to retain the costs of the conveyances, and the testator is entitled to stand in their place.

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The MASTER of the ROLLS.

Mr. *Smith*, the tenant for life, has laid out a sum exceeding 2,000*l.* in the buildings, or what may be called in the permanent improvements of the property purchased under the powers contained in his settlement; but there is not a tittle of evidence to show, that this was intended as an investment of the trust fund. It is stated that it was done with the privity and concurrence of the trustees and his wife; that is to say, the trustees and the wife knew that this gentleman was laying out considerable sums of money in improving the property so purchased. It may have been with the knowledge of the trustees, and no doubt was with the knowledge of his wife, for she was living with him, and must have known what was taking place on the property. But even if there were no question whether, under a trust for the investment of trust money in the purchase of land, an investment in the improvement of land already purchased would be justified or permitted, without the sanction of the Court, and even if that point were decided in favour of the Defendant, still the formalities required by the power were not complied with, for it is expressly directed that the trust money shall only be laid out at the request, in writing, of Mr. and Mrs. *Smith*. No such request was made by either; the money was not laid out by the trustees, and they exercised no control or judgment on the subject, and it might even be extremely difficult to ascertain whether the money was, to the full extent, laid out in a manner beneficial to the inheritance. It is quite clear, however,

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ever, that this was not an investment and expenditure by the trustees which the settlement contemplated. It was a simple expenditure by the tenant for life alone, and after his death, it is contended, that it was a satisfaction, *pro tanto*, of his covenant to pay a sum of 3,000*l*. I must look at the case exactly in the same way as if the sum of 3,000*l*. had been actually paid to the trustees, and invested by them, and was now standing in the funds, on the trusts of the settlement, and as if Mr. *Smith*, having laid out 2,300*l*. in building, now came and insisted that the money in the funds should be applied in repayment to him of the money which he had so expended. I am of opinion that that could not be done against the wish of the persons who were interested in the settlement, and whose request in writing was required, as a sanction for the expenditure of the money.

The next question is, whether the costs of the conveyance and investment of the 17,000*l*. ought to be deducted. At first I had considerable doubt on the subject; because I think it is quite clear, on the terms of the settlement, as well as on principle, independently of the settlement, that if the trustees, in laying out the money themselves in the purchase of these lands, had incurred costs, they would have been entitled to retain them out of any trust funds in their hands. But this is not so here; the costs have not been incurred by the trustees, but by a person who was not authorized to lay out the money. It is said that the costs would have been the same, and that they must have been incurred by some one. Respecting that I am unable to form any opinion, or as to what extent it would have been so. But here are costs of the conveyance paid by the tenant for life; who, if he thought fit, was fully entitled and might be justified in paying them: but he himself,
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in his life, made no claim against the trustees in respect of them. If he had made a claim, and said "You are liable to pay this sum," and they had in consequence paid him that amount, or if they are now liable to pay it to his estate, they would then, in my opinion, be entitled to recoup themselves, and to deduct the amount from the trust funds in their possession. The trustees of the settlement are, "out of any monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain and to reimburse themselves respectively, and allow their co-trustees all costs, charges and expenses which they, or any of them, shall or may suffer, sustain, or be put unto, in or about the execution of the aforesaid trusts respectively, or in relation thereto." The trustees are therefore entitled to deduct, out of the trust funds, any costs, charges and expenses, they have been put to; but it does not, therefore, follow, that they are entitled to deduct any costs, charges or expenses which another person has been put to in relation to the trusts. If that other person can enforce payment against them, they will, by that means, be entitled to do so; but I have heard nothing to satisfy me, that there is any species of debt, or any means by which the trustees could be made liable to Mr. *Smith*, in respect of the expenses which were voluntarily paid by him; and the expression "voluntarily," used by Mr. *Roupell*, appears to me accurately to describe the transaction. He might have thrown these expenses upon the trustees, and have said "you are liable to pay them," and thereupon they might have deducted the amount out of the trust funds, or taken it in satisfaction of his covenant. He has not done so, but has thought fit to pay the amount himself, and, therefore, the proviso of the deed, which enables them to deduct any costs they may incur, does not arise.

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I am of opinion, therefore, that the estate of Mr. Smith is liable to pay the whole 3,000*l.*, which must be raised and held upon the trusts of the settlement.

DARKIN v. DARKIN.

December 15.

The savings of a wife's separate estate were invested in the joint names of husband and wife. The fund was afterwards applied in the purchase of a real estate. After the death of the husband, the Court, on the evidence, held, that the estate belonged to the wife.

Two promissory notes, and a gas share, were left to a *feme sole* for her separate use. She married, but they were not settled, and they were subsequently transferred into the name of the husband.

There being written recognitions of the husband that they were the wife's, held, after his death, that they belonged, as separate estate, to her.

IN 1828, Miss *Paramore* married Mr. *Charles Darkin*, a dissenting minister. At this time she was entitled to two promissory notes for 100*l.* and 60*l.* each, a share in a gas company, which had been bequeathed to her for her separate use, and 3,550*l.* consols. On her marriage, the consols were settled for her separate use for life.

The savings of her separate estate were, from time to time, invested in the funds, in the names of Mr. and Mrs. *Darkin*.

In 1845 Mr. *Darkin* purchased a piece of freehold ground and built a house thereon. The money was the produce of the savings of the separate estate, sold out of the funds for that purpose. Upon the settlement of the purchase, Mrs. *Darkin* (observing that the property was conveyed to her husband absolutely, and uses to bar dower) required some recognition of right, whereupon her husband executed and delivered to her his will, by which he devised to her the freehold property in question, and appointed her sole execut

Mr. *Darkin* made a subsequent will in 1851 which, without referring to the former will, he d

and bequeathed all his real and personal estate to the Defendant, his brother, and appointed him sole executor.

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It appeared that the gas share had been transferred to the husband, and that the notes had been renewed and made payable to him. There were, however, in Mr. *Darkin's* account books, recognition, on his part, of the separate right of his wife to this property. After the death of Mr. *Darkin*, his widow instituted this suit, praying a declaration that her husband's brother was a trustee for her of the real estate, gas share, and promissory notes.

The Defendant neither put in an answer, nor entered into evidence, and the cause came on for hearing, supported by the evidence of the Plaintiff, and the stock-broker and solicitor.

Mr. *R. Palmer* and Mr. *C. H. Grove*, for the Plaintiff. As to the real estate, Mr. *Darkin* could not, by a subsequent will, revoke the first. The first, like a mutual will, was a contract between the two parties, which could only be revoked by the mutual consent of both; *Dufour v. Pereira* (a). There is distinct evidence of the contract, in pursuance of which the separate estate was employed in purchasing the property. The Plaintiff's husband, in his lifetime, fully recognized his wife's separate right to the property in question, and to the savings of her separate estate; he therefore became a trustee for her; *Slanning v. Style* (b). The separate estate being traced, can be followed into its present investment; *Ryall v. Ryall*; Lord *Chedworth v. Edwards* (d); and *Pennell v. Deffell* (e). They also referred to *Jackson v. Innes* (f).

Mr.

(a) 1 *Dickens*, 419.

(b) 3 *P. Wms.* 337.

(c) 1 *Atk.* 59.

(d) 8 *Ves.* 48.

(e) Lords Justices, *July* 16, 1853.

(f) 1 *Bligh*, 104.

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Mr. *Lloyd* and Mr. *Hardy*, *contra*, contended, as to the freehold, that the evidence did not make out that it had been purchased out of the savings of the separate estate, nor the alleged agreement respecting it. And as to the personal property, that having been placed in the name of the husband, it must be assumed to have been done with the assent and concurrence of the wife. That he had received it in his character of husband, and not as trustee, and therefore was not accountable to her or her representatives; *Caton v. Rideout* (a); where it was held, that a husband was not accountable for the dividends of the separate estate of his wife received by him with her permission.

The MASTER of the ROLLS stopped the reply as to the land, intimating that the Plaintiff had made out her case.

Mr. *R. Palmer*, in reply on the other point.

The MASTER of the ROLLS.

I am of opinion that it is established by the evidence, that the land was bought with the separate estate of the wife, and that it was agreed, that her husband should enjoy it for life, and that it should afterwards belong to the survivor. If the testator had expressly said, in the second will, that he gave this particular estate to his brother, it would have been ineffectual, if the estate had really been purchased with the separate property of the Plaintiff.

I am of opinion that it was bought with the separate property of the wife, and that it was intended to remain her

(a) 1 *Mac. & G.* 599.

her separate property, and therefore a trust arises in respect of the land.

With regard to the two promissory notes and the gas share, I have had more doubt. It is to be borne in mind, that these, from the first, were her separate property. They were transferred to the husband with the assent of the wife; and if he had continued to receive the dividends, then, according to *Caton v. Rideout*, it might be inferred, that the wife knew of the manner in which they were applied, and had agreed that her husband should receive them for his own use and benefit. But this objection is met by the production of the book of account, in the handwriting of the husband, who acknowledges that the dividends and interest were received for the benefit of his wife, and in 1841 the wife signs the book as having received the dividends herself.

In this state of the case, it appears to me, that I must consider the book evidence, and although the dividends were received by the husband with the sanction of his wife, yet that they were received for her. There is evidence of a trust in writing, and it is, therefore, unnecessary to resort to the principle laid down in *Rich v. Cockell* (a), that the burthen of proof in such a case lies on the husband.

I am of opinion that the wife, who succeeds altogether, ought to have her costs, though not personally, against the Defendant. He acted properly in requiring the Plaintiff to prove her case, and it was his duty to do so, but the suit has arisen from the husband's not having left any accurate trace of the existence of the trust; I must therefore deal with the costs of suit as if he were here, and I am of opinion that his estate ought to bear them.

(a) 9 Ves. 369.

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JONES v. BAILEY.

December 16.

The relief to which a judgment creditor is entitled, under the 1 & 2 Vict. c. 110(a), is a foreclosure, and not a sale.

THE Plaintiff obtained a charge on the Defendant's real estates, by virtue of a judgment obtained in 1852, and under the provisions of the 1 & 2 Vict. c. 110. He filed the present bill, praying a declaration of the validity of the charge on the estate, and in default of payment, for a sale of the estate and payment thereout of the debt and costs.

A question arose, whether the Plaintiff was entitled to a sale or foreclosure.

Mr. *Fleming*, for the Plaintiff, insisted on his right to a sale. He referred to the 15 & 16 Vict. c. 86 (b).

The Defendant did not appear.

The MASTER of the ROLLS.

The Plaintiff has that which is equivalent to an agreement to execute a legal mortgage ; and if that were done, the Plaintiff would only be entitled to a foreclosure. I think he is entitled to that decree and shall order accordingly.

I cannot on this record act upon the recent statute, in the absence of the Defendant.

(a) Sect. 13.

(b) Sect. 48.

NOTE.—See *Pain v. Smith*, 2 Myl. & K. 417 ; *Parker v. Housefield*, 2 Myl. & K. 419 ; *Perry v. Keane*, *Coote on Mortgages*, 713 ;

Price v. Carver, 3 *Myl. & Craig*, 157; *Farrow v. Rees*, 4 *Beav.* 25; *Carlton v. Farlar*, 8 *Beav.* 525; *Brocklehurst v. Jessop*, 7 *Sim.* 438; *Meller v. Woods*, 1 *Keen*, 16; *Lewis v. John*, 1 *C. P. C.* 9, 10; *Russel v. Russel*, 1 *Bro. C. C.* 269; *Featherstone v. Fenwick*, and *Harford v. Carpenter*, *ib.* note; *Birch v. Ellames*, 2 *Anst.* 428; *Ex parte Wright*, 19 *Ves.* 255; *Newton v. Aldous*, *Lavender v. Roberts*, *Warren v. Barling*, *Lungdon v. Wilmot*, *Meux v. Ferne*, *Spring v. Allen*, referred to in 2 *Myl. & K.* 421, 422; *Thorpe v. Gartside*, 2 *Y. & Coll. (Exch.)*, 730; *Lister v. Turner*, 5 *Hare*, 293; *Pryce v. Bury*, 2 *Drew.* 41; *Harris v. Harris*, 3 *Atk.* 722; *Daniel v. Skipwith*, 2 *Bro. C. C.* 155; *Smith v. Nelson*, *Seton on Decrees*, 180; *Hiern v. Mill*, *ib.* 178; *Seton on Decrees*, 178—180; *Monkhouse v. The Corporation of Bedford*, 17 *Ves.* 380, and referred to in 7 *Sim.* 440.

The draft minutes do not agree with my note, nor with that on counsel's brief, which was, "The usual foreclosure decree."—C. B.

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TYLEE v. TYLEE.

MR. SCHOMBERG moved, with the assent of all parties, for the appointment of a receiver of the purchase-money of an estate in *Canada* without sureties. A married woman and infants were interested.

Mr. Hoare, for the Defendant, assented, but

The MASTER of the ROLLS said, that, consistently with *Manners v. Furze* (a), it could not be done.

December 19.

A receiver will not be appointed without sureties, though not objected to, if persons not competent to consent are interested.

(a) 11 *Beav.* 30.

1853.

AYLES v. COX.

Ex parte JOHN ATTWOOD.

Dec. 20, 21.

It is not necessary for the lord of a manor to appear in Court to consent to a vesting order under the Trustee Act (13 & 14 Vict. c. 60, s. 28).

After a decree for the sale of an intestate's copyhold estate, in lots, but before the sale, the infant heir of the intestate was admitted. Held, that a petition for a vesting order was properly presented by the purchaser, whose money was in Court, and that the costs of the order were to be borne by the vendors, and to be paid out of the purchase-money of the particular lot, and not out of the fund in Court generally.

BY the decree on further directions, dated the 28th of July, 1843, the real estate of *Anthony Cox*, the intestate, was ordered to be sold; and *Anthony Cox*, the infant heir-at-law of the intestate, and all proper parties, were ordered to join in the sale as the Master should direct.

On the 6th of *September*, 1848, the property was accordingly put up for sale in lots, and lot nine, consisting of a piece of copyhold land held of the manor of *Dover Court*, to which *Anthony Cox*, the infant heir, had been admitted on the 16th of *October*, 1844, was purchased by *John Attwood*, who, having paid his purchase money into Court, presented a petition, stating that the Defendant *Anthony Cox* was still an infant; and praying, that an order might be made, vesting the copyhold hereditaments in him, his heirs and assigns, and that his costs of and incidental to this application might be paid out of the monies standing to the credit of this cause, to an account entitled "The amount of monies arising from the freehold estates of the intestate *Anthony Cox*."

The lord of the manor of *Dover Court* was willing to consent to the order being made.

Mr. *Grenside*, in support of the petition, contended, that the case came within the Trustee Act, 13 & 14 Vict. c. 60, that the application had been properly made by the purchaser, who, under the 37th section, was the "person beneficially interested in such lands," the purchase-money

purchase-money having been paid into Court;" *King v. Leach* (a); *Rowley v. Adams* (b); and that the costs ought to be borne by the intestate's estate and not by the purchaser; *Re South Wales Railway Company* (c); for under the old practice, when, at the date of the contract, the legal estate was in an infant, the expenses of having the conveyance settled by the Master must be borne by the vendor, although the purchaser bought with notice of the state of the title (d); *Brown v. Lake* (e); *Paramore v. Greenslade* (f).

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Ex parte
 ATTWOOD.

Mr. Waller, for the Plaintiffs, the vendors, contended, that the purchaser was not the proper party to present the petition under the Trustee Acts; that, at all events, the vendors ought to have been made co-Petitioners, *Rowley v. Adams* (b). That the application was at least premature, and that the purchaser, before presenting his petition, ought to have applied to the vendors to procure a surrender of the premises to be made by the infant heir, under the provisions of the 1 Will. 4, c. 65, which he had not done, and that as the property had been sold in lots to a great many purchasers, the proper course would have been, for the vendors to obtain one general order, empowering some person to surrender or convey the several lots in the place of the heir, thereby saving the heavy expense of separate orders by each purchaser, which would be most oppressive. He argued, that the expense of a conveyance would have to be borne by the purchaser, who ought, therefore, to bear some part of the expenses of obtaining a vesting order. *Stilwell v. Mellersh* (g) was also referred to, in the course of the argument.

Mr.

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| (a) 2 Hare, 57. | (e) 15 L. J. (N. S.) Chan. 34. |
| (b) 14 Beav. 130. | (f) V. C. Stuart, Nov. 5, 1853. |
| (c) 14 Beav. 418. | (g) 10 Sim. 367; 4 Myl. & |
| (d) Dart's Vend. & Pur. 373, | Cr. 581. |
| (2nd edit.) | |

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Mr. *Mott* appeared for the lord of the manor, to consent to the order.

The MASTER of the ROLLS.

I think the purchaser is the proper person to apply, and I have already decided, that the appearance of the lord of a manor to consent is not necessary, a verified certificate of his consent being sufficient. I do not, at present, see what the lord of the manor has to do with the application. I will inquire as to the practice, whether the vendor or purchaser pays the costs.

December 21.

The MASTER of the ROLLS said, he had looked through the cases cited, and was of opinion, that the application for a vesting order had properly been made by the purchaser, and that the vendor must pay the costs, except those of the lord of the manor, whose consent in Court was not required. The costs, he said, must be paid out of the purchase-money of this particular lot, and not out of the fund in Court generally.

GAUNTLETT v. CARTER.

July 16, 18, 19.

A devise of property in Bullen Court, Strand, and Maiden Lane, in the "County of Middlesex," held to pass property in Bullen Court, and in the

nd, and in
den Lane.

WILLIAM MINIER, by his will, dated the 3rd of September, 1835, after devising and bequeathing "all that leasehold messuage and premises situate in the *Strand*, in the county of *Middlesex*" [*describing it*], and his freehold warehouses "situate *Villiers Street, Strand*," to *Rachael Haward*, and making a bequest to the children "of Mrs. *Dupin*, of *Cecil Street, Strand*," proceeded thus:—"I give, devise and bequeath my freehold

freehold estates, situate in *Bullen Court, Strand, and Maiden Lane, in the county of Middlesex* (a), unto the said *Rachael H. Minier and Charles Dupin*," for their joint lives; and on the decease of either, to the survivor in fee. The testator then devised and bequeathed his residuary real and personal estate, upon trusts to sell, and he gave the ultimate produce to *R. H. Minier and Charles Dupin*, to be equally divided between them, share and share alike.

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The testator, at the time of making his will, and at his death, was seised in fee of certain freehold houses and premises, situate in *Bullen*, otherwise *Bull Inn, Court, Strand*, and of two freehold houses in the *Strand* adjoining *Bullen Court*, and numbered respectively 406 and 407, and of other freehold and copyhold hereditaments; and he was also possessed of certain leasehold premises, situate in the *Strand*, and other leasehold premises. The houses in *Bullen Court*, and the two houses numbered 406 and 407, in the *Strand*, were purchased by the testator and his brother *Charles*, in 1806, and were conveyed to them as tenants in common by the same deed, and they were held by the same title; the moiety of this property belonging to his brother descended upon the testator, on his brother's death. The whole, moreover, constituted one entire mass or block of buildings, and the northern part of the house No. 407, in the *Strand*, extended to the house No. 15, *Bullen Court*, and the ground floor and cellarage of the former were under the upper stories of the latter. The western wall of No. 407, also formed part of the eastern side of *Bullen Court*, and some of its windows look into the court, the entrance to the court from the *Strand* being
by

(a) Before and after the word "Strand," in the specific devise in question, there were commas, but when or by whom inserted did not appear.

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by an arched or covered way, leading northwards, and the name "*Bullen Court*" being written on the house No. 408, in the *Strand*.

After the death of the testator, *R. H. Minier* and *C. Dupin* entered into the receipt of the rents and profits of the freehold estates in *Bullen Court* and *Maiden Lane*, and also of the two houses Nos. 406 and 407, in the *Strand*, believing the latter to have been comprised in the specific devise to them.

R. H. Minier died in 1838, having by her will given the residue of her real and personal estate to her sister, *Elizabeth Stump Gauntlett*, the Plaintiff.

Charles Dupin died in 1850, having by his will devised his real estate to trustees, upon certain trusts to sell.

A question now arose between the Plaintiff and the trustees of *Charles Dupin*, the former contending that the two houses passed under the residuary devise to *R. H. Minier* and *C. Dupin*, and the latter insisting that they were comprised in the specific devise to the same parties. In the former case the Plaintiff, as residuary devisee of *R. H. Minier*, would be entitled to a moiety, and, in the latter, the trustees would take the whole.

Mr. *Lloyd* and Mr. *Dickinson*, for the Plaintiff. The question is, whether the word "*Strand*" is to be taken as a description of *Bullen Court* or of the estate in the *Strand*. In previous clauses of his will, the testator has used the word "*Strand*" to express the situation or locality of the property disposed of, as "*Villiers Street, Strand*;" and, therefore, in the specific devise in question,

question, the words "*Bullen Court, Strand*," are merely descriptive of the court or of the locality of the thing given. There is no express reference to any estate and houses in the *Strand*, and therefore the two houses in the *Strand* are undisposed of by this specific devise and pass by the residuary devise. If however it should be held, that the word "*Strand*" is merely descriptive of *Bullen Court*, a question may arise, as to whether the house No. 407, is in *Bullen Court*. The same question arose in *Newton v. Lucas* (a); but that case is distinguishable from this, for in *Newton v. Lucas*, on the entrance into *Denmark Court*, the words "*Denmark Court*" were written on the house in question; but here the words "*Bullen Court*" are written over the entrance of the court, not, indeed, on the testator's house, but on the next house, No. 408. If the punctuation be relied on, it cannot assist the Plaintiff. [*The Master of the Rolls*. It seems to me that the stop between "*Bullen Court*" and "*Strand*" is intentional, for it is apparently afterwards introduced.] Where the testator intends to describe a place or locality, he uses the word "*Strand*," but where he means to describe the property, he employs the words "in the *Strand*."

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Mr. R. Palmer, Mr. J. Baily and Mr. Prendergast, for *Carter* and the other trustees of *Charles Dupin's* will. The whole property is one comprehended under one title and conveyed by one deed. [*The Master of the Rolls*. The difficulty is that in speaking of the street the testator puts in the article where he means to describe the estate, and omits it where he means place or locality merely. It is usual, in ordinary parlance, to say "living in the *Strand*." I do not see how I am to reject

(a) 6 Sim. 54 (reversed 1 Myl. & Cr. 391).

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reject the commas ; and I shall assume that they were put in by the testator.] In stating locality of property the words "in" or "in the" before each parcel are unnecessary, and the word "*Strand*" is sufficient to pass property in the *Strand*. The word "*Strand*" is no more necessary to describe *Bullen Court* than it is to describe *Maiden Lane*. The intention to pass the whole is clear on the face of the will, and the word "*Strand*" being isolated from the preceding and following words, by means of the commas, shows such to be the meaning. But even assuming the commas to be rejected, the word "*Strand*" cannot be taken as a part of the description of the houses in *Bullen Court*, but the words "in" or "in the" must be introduced before each description. The street itself, though called "the *Strand*," is named on the walls simply "*Strand*," not "the *Strand*." It is incorrect to refer to other parts of the will in aid of the construction of an independent devise, on which alone it is necessary to put a construction. They referred to *Newton v. Lucas* (a); *Walker v. Tipping* (b); and *Childs v. Elworthy* (c) was also cited as to referring to last antecedent.

Mr. *Langworthy*, for the trustee and executor of the original testator.

July 19. *The MASTER of the ROLLS.*

There is a considerable degree of obscurity upon this will. Looking at the various instances in which the testator has used the word "*Strand*" in the former part of the will, they appear to me to be inconsistent with the form in which he has used it in the particular passage in question.

When

(a) 1 *Myl. & Cr.* 391, reversing *S. C.* 6 *Sim.* 54.
 (b) 9 *Hare*, 800.

(c) *August* 4, 1852, on appeal from Vice-Chancellor *Turner*.

When I first looked at the will and observed, that when he speaks of his leasehold messuage he calls it in "the *Strand*," and that when he describes "*Villiers Street*" and "*Cecil Street*," he speaks of them as "*Villiers Street, Strand*," and "*Cecil Street, Strand*," without using the word "the," my impression was in favour of the Plaintiff. But upon examining the clause itself more attentively, I observe, that he is not disposing of his houses, but of his estate, though he points out the parcels. He says, "my freehold estates situate in *Bullen Court, Strand*, and *Maiden Lane*," and there was a large block of property belonging to him, situate between *Maiden Lane* and the *Strand* and bounded by *Bullen Court*. Again, the introduction of the commas before and after the word "*Strand*" is a circumstance of importance; and though it is unusual to use the word "*Strand*" by itself, without the article "the," yet where there are preceding words of enumeration and it is used as part of a sentence, the custom of prefixing the article "the" is not always followed, for it is frequently used without it, in the enumeration of places.

I am of opinion, that the best construction of this clause of the will is, that the testator not only meant to dispose of the freehold estates situate in *Bullen Court*, but those also in the *Strand* and in *Maiden Lane*. At the same time, I cannot say that this is not a question of considerable obscurity, and another mind might very possibly come to an opposite conclusion on it. I must make a declaration, that, upon the true construction of this will, the freehold estates of the testator situate in the *Strand* passed by this devise to *Rachael Minier* and *Charles Dupin*, for the term of their joint lives, and that immediately upon the decease of either to the survivor in fee. I shall give the costs of both parties out of the estate.

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Dec. 12, 13.

1854.

ROBINSON v. LOWATER.

January 18.

Under a trust to pay a specified debt of the testator and debts generally, a purchaser of the estate is not bound to see the specified debt paid.

When there is a charge of debts generally, or of legacies and debts generally, a purchaser is not bound to see to the application of the purchase-money, but *secus* when the trust is to pay schedule debts or legacies simply.

The case of *Doe d. Jones v. Hughes* (6 *Exch. Rep.* 223) observed upon.

Whether a mere charge of debts gives to the executor a power of sale by implication, *quære*.

THE testator had three properties. The first at *Rutland Place*, which was subject to a mortgage for 200*l.* to Mrs. *Waplington*; the second at *Sandfield*, the legal estate of which was vested in *Nathaniel Sulley*; and the third at *Arnold*.

By his will, dated in 1817, he devised *Rutland Place* to his daughter *Elizabeth* for life, with remainder to her children (the Plaintiffs). He devised *Sandfield* to his son, *Richard Sulley*, for life, with remainder to his children. He then devised his estate at *Arnold*, and his personal estate, to *Richard Sulley*, and his heirs, &c.; "subject nevertheless" and he did thereby charge the same with and to the payment of the sum of 200*l.*, owing to Mrs. *Sarah Waplington*, on mortgage of his *Rutland Place* property, and of certain legacies; "and with and to the payment of his just debts and funeral and testamentary expenses." But if his said premises at *Arnold*, and his said personal estate, should not be sufficient for that purpose, then he did thereby charge his two closes in the *Sandfield* with the payment of such deficiency. And he appointed his son *Richard Sulley* sole executor.

By a codicil, the testator revoked the devise of the *Arnold* property to his son *Richard Sulley*.

The testator died in *July*, 1819, and his will was proved

proved by *Richard Sulley*, who applied the personal estate in payment of the debts, &c. so far as it would extend, but he did not discharge the mortgage debt due to *Mrs. Waplington*.

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On the 8th of *June*, 1820, *Richard Sulley*, in consideration of 175*l.*, sold and conveyed *Sandfield* to *Nathaniel Sulley*, who had notice of the will, which was recited in the conveyance. The testator's heir at law, and every one directly interested in the *Sandfield* estate (except the devisees of the *Rutland Place* property), concurred in the conveyance. The Defendant *Lowater* derived his title to *Sandfield* under this purchase.

The testator's daughter *Elizabeth* died in 1830, leaving the four Plaintiffs her only children, who thereupon became entitled to the *Rutland Place* property. The first Plaintiff attained twenty-one in 1842, and the others subsequently; and in 1852, they instituted the present suit, insisting that the *Sandfield* property was still liable, in the hands of the present owners, to pay off the mortgage of 200*l.* on the *Rutland Place* property, which still remained unpaid.

Mr. *R. Palmer* and Mr. *Batten*, for the Plaintiffs. The *Sandfield* estate, in the hands of the Defendants, is still liable to the payment of the mortgage of 200*l.* which now remains due, and the Plaintiffs are entitled to have the amount, together with interest, raised and applied in exoneration of the *Rutland Place* property.

In the first place, the will conferred no power or authority on *Richard Sulley*, the executor, to sell the property. It contains no power or direction for sale,

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and merely "*charges*" the *Sandfield* estate with the 200*l.* It has been expressly held, that a mere charge of debts, &c. gives no implied power of sale to an executor; *Doe d. Jones v. Hughes* (a). In that case, a testator charged his real estate with his debts, &c. and appointed his widow executrix. It was held, that she had no power of selling his *Bala House* for payment of his debts.

Secondly, the mortgage debt of 200*l.* being specified, a purchaser was bound to see the purchase-money applied in its payment. The rule is thus laid down (b): "When a person devises real estate, and charges it with the payment of debts generally, they not being specified, as by a schedule to the will, a purchaser of the estate is not bound to see to the application of his purchase-money. But if the debts, all or some of them, are specified, then the purchaser is, in equity, obliged to see his money applied in the payment of such specified debts."

In *Powell on Mortgages* (c), the rule is thus stated in Mr. *Coventry's* note:—"Where the trust is for payment of debts mentioned in a schedule, and also for other debts not scheduled, it should seem the purchaser will be bound to see his money applied in the payment of the scheduled debts. But if the scheduled debts are paid, then he will be exonerated; for, as to the residue of the trust, it is so unlimited and undefined, that a purchaser could not reasonably be expected to see its execution. The contrary of this position (that where the trust is for payment of scheduled debts, and also for debts unscheduled, the purchaser will be exempt *ab initio*) may, perhaps, be inferred from the present Vice-Chancellor's observations

(a) 6 *Exch. Rep.* 223.

(b) *Ram on Assets*, 93, 2nd ed.

(c) Vol. 1, page 243, note 2,

6th edit.

ions in *Binks v. Lord Rokeby* (a); but it is ap-
 ed that the rule, as above stated, is borne out
 ases on this subject."

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ly, *Nathaniel Sulley* was a trustee, and in effect
 saction was merely a sale by a trustee to himself,
 consent of persons not authorized to sell, viz.
 nt for life and heir at law, a transaction which
 e supported in this Court. Besides, the con-
 remainder to the issue of *Richard Sulley*, being
 e, could not be destroyed, and therefore the
 nce was ineffectual.

also referred to *Spalding v. Shalmer* (b), and
Baldwin (c).

loyd and Mr. *Humphry*, *contra*, for the owners
 andfield property. First, this will gives to the
 ; by implication, a power to sell, in order to
 d distribute the amount charged on the *Sand*-
 erty, for "if a testator charges his real estate
 yment of his debts, that, *primâ facie*, gives his
 r power to sell the estate, and to give a good
 ge for the purchase-money;" *Forbes v. Pea*-
 ; 1 *Sugden on Powers* (e), and the cases there
Alton v. Harrison (f); *Pitt v. Pelham* (g); *Shaw*
er (h); *Bentham v. Wiltshire* (i); *Ball v. Har*-
Gosling v. Carter (l). The amount due to the
 s could only be ascertained by the executor, and
 cessarily be raised by a sale, which, in the ab-
 sence

Madd. Rep. 239.
Vern. 301.
es. sen. 173.
Sim. 541.
pe 133 (6th ed.)
ment. 276, n.

(g) 1 *Ch. Ca.* 176; 1 *Lev.*
 304.
 (h) 1 *Keen*, 559.
 (i) 4 *Madd.* 44.
 (k) 4 *Myl. & Cr.* 264.
 (l) 1 *Coll.* 644.

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sence of any other direction, ought to be effected by the person having the duty of distributing the money, viz. the executor. A charge of debts has always, until *Doe d. Jones v. Hughes*, been considered as equivalent to a trust to raise and pay. In *Bailey v. Ekins* (a), Lord Eldon says, "I am confident Lord Thurlow's opinion was, that a charge is a devise of the estate in substance and effect, *pro tanto*, upon trust to pay the debts."

Secondly, the purchaser was not bound to see to the application of the purchase-money. There was a deficiency of the personal estate, and the general charge of debts enables the executor to give valid discharges for the purchase-money; *Stroughill v. Anstey* (b). If it were otherwise, a purchaser would be as much bound to see to the payment of the general as the specific debts. *Ram* and *Powell* are not authorities, and the cases to which they refer in support of their opinion in no way bear them out.

Thirdly, this is not a sale by a trustee to himself, but by the executor to *Nathaniel Sulley*.

Fourthly, the Plaintiff's remedy is barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 40; *Piggott v. Jefferson* (c); *Crallan v. Oulton* (d).

Mr. R. Palmer, in reply.

The MASTER of the ROLLS. I will consider this case.

The

(a) 7 Ves. 323.


(b) 1 De G. M. & G. 635.

(c) 12 Sim. 26.

(d) 3 Beav. 1.

The MASTER of the ROLLS.

The question in this cause is, whether there is now a subsisting charge on a property situate at *Sandfield*, in *Nottingham*, in the hands of the Defendant *Lowater*, who derives his title under a purchase from the executor of the testator who created the charge.

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 LOWATER.
 January 18.

The Plaintiffs insist upon being entitled to make the *Sandfield* closes liable in the hands of the present owners to pay the mortgage debt due to *Sarah Waplington*, and which is still existing as a charge on the property devised to them.

It is not disputed that *Nathaniel Sulley* had full notice of the contents of the will of *Richard Sulley*; and the first question is, whether he was bound to see to the application of the purchase-money, and to take care that the purchase-money was applied in payment of the mortgage debt to *Sarah Waplington*, as far as it could extend, and whether, in default thereof, the property did not remain liable to be applied in discharge of the same, at the instance of the devisees. If these questions should be determined in the affirmative, then arises another question, viz. how far the rights of the Plaintiffs are affected by the lapse of time.

I shall first consider how this case would stand, if the will of the testator had created a clear trust, instead of a charge for the payment of these sums, and then consider how the case is affected by reason of the will having *charged* these debts on the property devised, instead of having created a trust for their payment. It is quite settled, that land devised to executors, subject to a general charge of debts, or in trust to pay debts generally,

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generally, will enable the executors to sell and make a good title to the land, and that a purchaser will not be bound to see to the application of the purchase-money. Authorities for this proposition are numerous, and need not be referred to. It is also settled, that if the trust be for the payment of specified or scheduled debts, in these cases the purchaser is bound to see to the application of the purchase-money. So, when the trust is for the payment of legacies simply, not including debts, the purchaser is bound to see to the application of the purchase-money, because the legacies are specified as distinctly as scheduled debts; but if the trust be for the payment of both debts and legacies generally, then the purchaser is not bound to see to the application of the purchase-money in the payment of these legacies, though they are specified, because to do so would involve him in the necessity of seeing to the due application of the purchase-money in the payment of the debts generally, that is, to see to the due performance of an unlimited and undefined trust. This is decided by *Rogers v. Skillicorne(a)*, and several other cases.

Here the trust, assuming it to be one, is to pay 200*l.* owing to Mrs. *Sarah Waplington*, two legacies of 20*l.* each, and two sets of legacies in favour of two classes of legatees, and then to pay debts, and funeral and testamentary expenses generally. But for the particular mention of the debt to *Sarah Waplington*, no question could have arisen, but that the purchaser would not have been bound to see to the application of the purchase money. The question is, whether the mention of this debt creates any difference. It is to be observed, that no priority is given to this debt over the other debts of the testator; it is, in truth, nothing more than

(a) *Ambler*, 188.

than this, a direction to pay a particular debt and all the other debts of the testator.

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I am of opinion that the enumeration, by the testator, of one or more debts, coupled with the direction to pay all the rest of his debts, will not make it necessary for the purchaser to see that these particular debts are paid.

In the absence of any priority given by the testator to this debt over the others, the trust is equally for the benefit of all the creditors; and to hold that the purchaser must see that this one is paid, without seeing that all others are paid, would be, in effect, to give a preference to one *cestui que trust* over the others, and to hold, that the purchaser was bound to see to the performance of a part only of one simple and indivisible trust, disregarding whether the rest of it be performed or not. For this proposition no authority was, or, as I believe, could be cited to me. If this be not so, it would follow, that the purchaser would, in this case, if at all, be required to see to the performance of the whole trust for the payment of the debts of the testator, generally, which no purchaser is required to do. If, therefore, the suit were at the instance of *Sarah Waplington* herself, it would appear to me to be inconsistent with the principles upon which these cases have been decided, to hold, that the purchaser was bound to see that the money had been applied in payment of this debt. But this is not a suit on her behalf.

The interest of the Plaintiffs is not that of creditors; they are entitled to no part of this debt; their interest in respect of it, under the will, is the interest of legatees: the estate originally liable to pay the debt is devised



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vised to them, and so far as that estate goes, they are debtors; but the testator has, in substance, created a charge in their favour, in another property, to the extent of that debt, in order to enable them to take the devised estate exonerated from all incumbrances. Their interest in this charge, as distinguished from the interest of the creditor, is clear and distinct; the will gave *Sarah Waplington* nothing by the special mention of her debts, the general charge of debts alone gave her as complete a charge on the property devised, as was given by the particular mention of her debt, uncoupled with any direction that it was to have priority over the other debts of the testator. The Plaintiffs, practically, could claim no interest until all debts were paid. If the personal estate had been insufficient, and if the produce of this estate had been exhausted in payment of *Sarah Waplington's* debts, the other creditors would have been entitled to stand in her place, as against the estate devised to the Plaintiffs. The right of the Plaintiffs to have this purchase-money applied in payment or reduction of *Sarah Waplington's* debt could not have been made available, unless the produce of the *Sandfield* property had been sufficient, after the personal estate had been exhausted, to pay the other debts of the testator, together with his funeral and testamentary expenses.

Without, therefore, deciding what rights *Sarah Waplington* might have had in case the estate mortgaged to her had been insufficient to discharge her debt, it appears to me, that to require the purchaser to see that the rights of the Plaintiffs were duly regarded, in the application of the purchase-money of the *Sandfield* messuages, would have involved him in the necessity of seeing that a general and unlimited trust for the payment

payment of debts had been duly performed, which no purchaser can be required to do.

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I have next to consider whether this case is varied by the circumstance that the devise is not a *trust* for the payment of debts, but merely a *charge* of such deficiency as the personal estate shall be insufficient to pay. The case of *Doe d. Jones v. Hughes*(a) is relied upon to show, that the executor could not make a good title to sell, and had no authority to sell vested in him. I find it difficult to reconcile the decision in that case with the numerous authorities to be found on this subject in Chancery; amongst which I may refer to *Ball v. Harris*(b), where Lord *Cottenham* observes, that a charge of debts is equivalent to a trust to sell so much as may be sufficient to pay them; *Forbes v. Peacock*(c), which, on this point, is not affected by the reversal of the decision (d); and to the case of *Gosling v. Carter* (e).

Before the case in the Exchequer, I had considered the law to be, that a charge of debts on an estate devised gave the executors an implied power of sale, because, to use the expression of Sir *J. Leach* in *Bentham v. Wiltshire* (f), the power to sell is "implied, from the produce being to pass through their hand in the execution of their office, as in the payment of debts or of legacies." I am of opinion, therefore, that a good title was made to the purchaser, *Nathaniel Sulley*, and that the Defendants claiming under him are entitled to hold it, discharged from all claim in favour of

(a) 6 *Exch.* 223.(b) 4 *Myl. & Cr.* 264.(c) 12 *Sim.* 541.(d) 1 *Phillips*, 717.(e) 1 *Coll.* 644.(f) 4 *Madd.* 49.

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of the Plaintiffs, and that this bill must be dismissed, with costs.

NOTE.—Affirmed by the Lords Justices, *April 27, 1854.*

MILFORD v. PEILE.

Jan. 20, 21.

Husband and wife covenanted to vest in the trustees of their settlement, upon the trusts thereof, "all property which should come to her absolutely, and not bound by any trust or provision, otherwise than for her absolute use." Held, that property bequeathed to her "for her separate use absolutely" was bound by the covenant.

Held, secondly, that leaseholds and chattels bound by the covenant were to be enjoyed *in specie* and unconverted.

BY the settlement made on the marriage of *Frederick Milford* and *Frances H. Lewis*, in 1848, (after reciting that "on the treaty for the said intended marriage, it was agreed that all property, exceeding 100*l.* in value at any one time, which the said *Frances H. Lewis* might thereafter derive from *Thomas L. Lewis* (her father), and which should not have been otherwise settled by him, should be settled in manner hereinafter expressed,") a sum of 10,000*l.* consols was assigned to trustees, in trust for the intended husband and wife, and after their death for the issue of the marriage.

And *Frederick Milford* and *Frances H. Lewis* thereby covenanted, that in case any real or personal estate, to the amount or of the value of 100*l.*, should at any time or times, during the joint lives of the said *Frederick Milford* and *Frances H. Lewis*, "by gift, devise, bequest, or intestacy, from or of the said *Thomas L. Lewis* (her father), come to or devolve on her, *Frances H. Lewis*, absolutely, and not bound by any trust or provision, otherwise than for her absolute use," then and in every such case the same real and personal estate should by such acts, deeds, transfers and assurances as should be necessary

necessary for the purpose and at the cost of such estate be duly vested in the trustees for the time being, &c., and be held upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisos and declarations (as far as the nature of the property would admit), as were thereby declared of the property thereby assigned.

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The marriage took effect and there was issue thereof three children.

Thomas L. Lewis, by his will, dated in 1852, gave "a leasehold house and some furniture and other chattels to trustees, in trust for his daughter *Frances H. Milford*, for her sole and separate use, absolutely." And he gave his plate in trust for her for life, for her separate use, with remainder as she should appoint, and in default to her children.

Mrs. Milford, by this bill, prayed a declaration, that the leasehold premises, &c., were not subject to the covenant, or if so, that the same might be assigned to the trustees of the settlement, and be enjoyed *in specie* by the parties entitled thereto in succession.

Mr. C. C. Barber. The leasehold property is given to *Mrs. Milford* "for her sole and separate use, absolutely," and therefore does not come within the meaning of this covenant to settle, for, by the will, it was already settled by her father. The recital also shows, that it was the intention to settle that only which might not otherwise have been settled by him. The parties could not have contemplated the settlement of any property which was already vested in trustees by the father, and the transferring of it from the trustees of the father's will to those
of

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of the marriage settlement. This property, therefore, is not bound; *Tawney v. Ward* (a); *Douglas v. Congreve* (b); *Travers v. Travers* (c); *Drury v. Scott* (d).

But if it comes within the covenant, then Mrs. *Milford* is entitled to the enjoyment of it *in specie*. There is nothing in the settlement which points to the sale or conversion of any property; on the contrary, it is to be vested in the trustees and held by them, subject to the trusts of the consols thereby assigned, "as far as the nature of the property will admit."

Mr. *Chapman*, *contra*.

Mr. *Fane*, for trustees.

The MASTER of the ROLLS was of opinion, that the leaseholds, &c., were bound; for the covenant of the husband bound all the property which came to him in right of his wife, and the wife's covenant all property which came to her for her separate use absolutely, by which means alone, she, as a married woman, could acquire the free and uncontroled enjoyment of it. He thought that this construction was not varied by the recital, but reserved his judgment as to the question of conversion.

January 21. The MASTER of the ROLLS.

I have looked through the settlement and I can find no trust for conversion.

(a) 1 *Beav.* 563.
 (b) 1 *Keen*, 410.

(c) 2 *Beav.* 179.
 (d) 4 *Y. & C.* 264.

NOTE.—See *Butcher v. Butcher*, 14 *Beav.* 222; *Ex parte Blake*, *In re London Dock Company*, 16 *Beav.* 463.

1854.

LEIGH v. LEIGH.

THE testatrix, by her will, dated in 1833, gave two-sevenths of the residue of her personal estate to three trustees for *Henry Leigh* for life, and after his decease, as follows:—"In trust for, and I do hereby give and bequeath the same unto *all the present born children* of the said *Henry Leigh*, their executors and administrators, equally to be divided between them, share and share alike."

At the date of the will *Henry Leigh* had four children, viz. the three Plaintiffs and *Barnabas Leigh*, who died in 1837, in the life of the testatrix.

In 1838, the testatrix made a codicil to her will, whereby she revoked the appointment of the three persons named in her will as her trustees and executors, and she appointed two of them and another person to be trustees and executors, and gave to them her residuary estate, upon the same trusts upon which the same residuary estate was so given and bequeathed in and by her will.

The testatrix died in 1843, and *Henry Leigh* died in 1853; and the question now was, whether the one-fourth share intended for *Barnabas Leigh* had lapsed, by his death in the lifetime of the testatrix, or was divisible amongst the Plaintiffs, as the surviving children.

Mr. *Lloyd* and Mr. *Hobhouse*, for the Plaintiffs. This
is

Jan. 23, 24.

Bequest to *A. B.* for life, and after his death to "all the present born children of *A. B.* equally." One of them died between the date of the will and the death of the testatrix.

Held, that his share did not lapse, but that the bequest, being to a class, the whole was divisible amongst those who survived the testatrix.

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is a gift to a class and not to individuals, and therefore there can be no lapse, for those persons take who answer the description at the death of the testatrix. The only peculiarity is, that the class of "present born children" was capable of diminution, but not of increase, and it is therefore necessary to fix its minimum limit at the time when the will came into operation.

But, secondly, the codicil of 1838, made after *Barnabas's* death, limits the class to those then living, and excludes *Barnabas*, who, as the testatrix must have known, was then dead. The Plaintiffs therefore take the whole, and there is no lapse. They cited *Viner v. Francis* (a); *Francis v. Collier* (b); *Lee v. Pain* (c); *Shaw v. Mc Mahon* (d); 1 *Roper on Leg.* (e).

Mr. Goodeve, for the next of kin of the testatrix. There is a lapse as to one-fourth of the bequest; the testatrix, no doubt, as the Plaintiffs contend, knew the state of the family, or the different families, and how far the forms of expression she used would carry out her intention. I adopt that view of the case. But a gift to "present born children" is a gift to the children then born individually, in the same way as if she had used their individual names. In all the cases relied upon by the Plaintiffs, the gift was to children generally, and not limited, as in this case. It was so in the case of *Viner v. Francis*, the gift being to the children of a deceased sister generally; and that case, moreover, is inconsistent with the case of *Martin v. Wilson* (f).

Mr.

(a) 2 *Cox*, 190; 2 *Bro. C. C.* 658.

(b) 4 *Russ.* 331.

(c) 4 *Hare*, 225.

(d) 4 *Dr. & War.* 431.

(e) Page 487.

(f) 3 *Bro. C. C.* 324.

Mr. *Welford* and Mr. *Baggallay*, for other next of kin of the testatrix, cited *Bain v. Lescher* (a); *Ackerman v. Burrows* (b).

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When a legacy is given to a class of persons, that class is to be ascertained at the time of distribution. The question is, whether this is a gift to a class or to specified individuals. If *Martin v. Wilson* (c) is to govern this case, I must decide for an intestacy, but I am disposed to follow *Viner v. Francis*, which has always been considered as a governing case. What I have to look at is, whether this is a gift to a class or not. It is a gift "unto all the present born children" of *Henry Leigh*. Now the expression "present born children" is a mere description of the class, and is similar to a bequest to all the male or female children of an individual; in which case, the persons fulfilling those conditions at the time when payment was to be made would take. I am of opinion that the circumstance that this class was not liable to fluctuation by addition, but only by diminution, does not alter the conclusion to be come to from the circumstance of its being given to a class. I think the three children who survived the testatrix, and who were the "present born children" at the time when the gift took effect, are entitled to the whole of the legacy.

Bain v. Lescher (a) is distinguishable, because there it was a gift to specified individuals, in which case it would

(a) 11 Sim. 397. (b) 3 Ves. & B. 54. (c) 3 Bro. C. C. 324.

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would lapse, in the event of death of a legatee in the testator's lifetime.

I do not determine this case on the second point argued, but am of opinion, on the construction of the original gift, that the three Plaintiffs are entitled.

January 28.

February 9.

STEDMAN v. COLLETT.

The settlement of a solicitor's bill by the client for a fixed sum is valid, and will not be disturbed by the Court, when it has been entered into fairly, and with proper knowledge on both sides.

Several years after a solicitor had ceased to act for his client, an agreement was entered into between them, for the delivery up of the client's papers, in consideration of a fixed sum to be paid to the

THE object of this suit was to obtain the benefit of an agreement, entered into between the Plaintiff and Defendant, on the 10th of *December*, 1844, for payment by the Defendant, upon a particular event, to the Plaintiff, of a fixed sum, for his services as solicitor of the Defendant.

The circumstances under which this agreement was entered into were as follows:—The will of the testator, *Edward Smith*, contained an ultimate limitation in favour of his next of kin; and on the failure of the prior limitations, Mr. *George Maule*, the solicitor of the Treasury, in 1825, on behalf of the Crown, obtained letters of administration to the testator, on the supposition that no next of kin existed. There was a considerable sum in Court, arising from the estate, to which several persons laid claim as next of kin. Amongst them the Defendant,

solicitor when the Court of Chancery should declare that he was one of the next of kin of *E. S.* and entitled to a fund in Court. No bill was delivered, and five years afterwards the right of the client was established. Held, that the agreement was valid, there having been no fraud or undue pressure, the client having had the full benefit of the agreement, and it being impossible to replace the parties in their original position.

A husband agreed to pay a sum of money, on "his" being held next of kin of *A. B.* and entitled to his property. The wife was and claimed to be such next of kin. The husband having succeeded in right of his wife, the Court held, that there was an error and mistake in the agreement, which ought to be rectified, and decreed the husband to make the payment.

Defendant, Mr. *Collett*, in right of his wife, claimed the fund, or part of it, as next of kin.

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In *April*, 1836, *Collett* employed the Plaintiff *Stedman* as his solicitor, in attending to and investigating the claims made by the other claimants in the Master's office, in a cause of *Turner v. Maule*, instituted for the above-mentioned object, and to preparing the way for the establishment of the Defendant's claim, by getting up evidence for that purpose. This employment continued until *December*, 1836, when the Plaintiff refused to continue to act for the Defendant, unless he could be supplied with funds, which the Defendant was then unable to do. It was not denied, that at this time, something was due from the Defendant to the Plaintiff; and although the Plaintiff now alleged, that after this lapse of time, he was wholly unable to make out any account of what was due to him, still it was not disputed, that 10*l.* was paid to a former solicitor for the delivery up of the papers of the Defendant, and that the expense of one journey, at least, of the Defendant, in company with a clerk of the Plaintiff's, occupying several days, to search parish registers, was paid by the Plaintiff.

No bill of costs was, however, made out or delivered to the Defendant at that time, probably in consequence of his poverty, nor was any asked for by him, and no demand of payment was made by the Plaintiff. From this time (*December*, 1836) the whole matter slept, and the papers remained in the Plaintiff's possession until the latter end of the year 1844 (eight years after the employment had ceased, and when the right to enforce payment had been lost). At this time, the Plaintiff being engaged in changing his offices, employed the Defendant in removing his papers to the new office.

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In the course of doing so, the Defendant recognized his own papers, and thereupon he applied to the Plaintiff to have them delivered up to him, as he still intended to prosecute his claim. The Plaintiff said he would look at them and consider the matter, and desired the Defendant to come on the following day. On the following day, the Plaintiff produced to the Defendant the agreement in question, and said that he would deliver up the papers if the Defendant would execute it. The agreement was read by and fully explained to, and understood by the Defendant, who thereupon executed it and received his papers. The Plaintiff, at the same time, paid the Defendant for the work he had done, deducting 15*s.* for the expense of the agreement.

The agreement, dated the 10th of *December*, 1844, after reciting that the Defendant (throughout the agreement called *William Collett*) was justly and truly indebted to the Plaintiff in the sum of 200*L.*, for business done by the Plaintiff, as solicitor for the Defendant, in the suit of *Nye v. Maule*, and certain proceedings in the Ecclesiastical Court, and for other business in his professional character, as the Defendant admitted, and that it had been expressly stipulated and agreed, that no bill of costs, &c., should at any time thereafter be required by the Defendant, but that the said sum of 200*L.* should be fixed and stipulated to be in lieu and full discharge of all bills of costs and other claims and demands of the Plaintiff; and reciting that the Plaintiff had agreed to deliver, and in pursuance of such agreement had delivered up to the Defendant, the documents and papers upon which he had a lien, upon the terms and conditions thereafter mentioned, it was witnessed, that the Defendant, in consideration of the premises, agreed, when and so soon as the Court of Chancery should declare "that he was the next of kin
of

of *Edward Smith* and *Sarah Hyatt*, and as such entitled to the sums of money, stocks and securities standing in the name of the Accountant-General, in trust in the cause of *Nye v. Maule*, or to any part thereof, he the Defendant would pay the Plaintiff the sum of 200*l.*, and interest thereon, at 5*l.* per cent., from the date of the agreement, and all sums necessary for effecting and keeping up an assurance on the life of the Defendant." And the Plaintiff covenanted, that until the Defendant should be declared the next of kin of *Edward Smith* and *Sarah Hyatt*, and as such entitled to the several sums of money, &c. or to such part thereof as would be sufficient to pay the 200*l.*, &c., he would not sue the Defendant for the said debt, &c., or any other claim or demand of the Plaintiff against him, up to the date of the agreement.

In *April*, 1846, *Collett* and wife, and others, took out certain letters of administration, and in *February*, 1847, instituted a suit against Mr. *Maule* and the Attorney-General, to establish the right of Mrs. *Collett* and others to the testator's personal estate. In 1849, their right was established, and considerable sums were, previous to 1853, paid out to them.


The Defendant having refused to pay the 200*l.*, &c., the Plaintiff filed his bill to have the declaration of the Court, that it was the intention of the agreement of the 10th of *December*, 1844, that the money, thereby made payable by the Defendant, should become payable, when the Court should declare *Sarah Collett* entitled to any part of the moneys in trust in the cause of *Nye v. Maule*, and should order payment thereof to her, or to the Defendant in her right, and praying an account and a lien on the stocks, &c. in which the money so paid out to *Sarah Collett*, or the Defendant, were invested.

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Mr.

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Mr. *Roupell* and Mr. *T. H. Terrell*, for the Plaintiff, contended, that the agreement was entered into *bonâ fide*, and with perfect knowledge, on both sides, of the circumstances under which the arrangement was made; that there was neither pressure nor advantage taken of the Defendant, who was conversant with legal matters, and perfectly competent, in point of information, to protect himself in such a case; that the agreement, therefore, was valid; *In re Whitcombe* (a). That it was no objection to such an agreement, that it was for the payment of a fixed sum at a future time, and without the delivery of a bill; that the event on which it was payable was contingent, and nothing might have ever have become payable; that the Plaintiff had a right to refuse to give up the papers until payment of or security for his costs, and that the special agreement precluded taxation until set aside by suit; *In re Whitcombe* (a); *Re Eyre* (b).

Mr. *R. Palmer* and Mr. *H. C. Ward*, for the Defendant, contended, that even if the agreement were valid, the Defendant could not support any claim upon it, as, according to its fair and literal construction, the event had not arisen upon which the payment was to be made, namely, the declaration by the Court that *the Defendant* was the next of kin of *Edward Smith* and *Sarah Hyatt*, and as such entitled to the fund, no such declaration having been made, or ever capable of being made. That the agreement, however, was invalid, on the ground of pressure, of want of information on the part of the Defendant, a fixed sum being stipulated on by a solicitor for his costs, without the delivery of any bill, and payable at a future time; *Wood v. Downes* (c). They argued

(a) 8 *Beav.* 140.

(b) 10 *Beav.* 569.

(c) 18 *Ves.* 120.

argued that at all events, the Defendant was entitled to have a bill of costs delivered and taxed in the ordinary way; *Ex parte Bass, re Stephen* (a).

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Mr. Roupell, in reply. The case of *Re Smith, ex parte Husband* (b), and the stat. 6 & 7 Vict. c. 73, were also referred to.

The MASTER of the ROLLS observed, that one question raised by the bill and to some extent at the Bar, was as to the construction of the agreement, and admitting it to be valid, whether it was an agreement by the Defendant to pay the 200*l.* in the event which had happened, viz. the establishment of *the claim of the Defendant's wife* to the fund, and not of the claim of the Defendant himself, except through her. That this had not been very strongly insisted upon, and that his opinion was, that the event contemplated by the agreement had arisen; and that assuming the document, under the circumstances of this case, to be a valid and subsisting agreement, the Defendant was liable to pay the Plaintiff the money thereby agreed to be paid. He would, however, reserve the point as to the validity of the agreement.

The MASTER of the ROLLS.

February 9.

The question is, whether the agreement of the 10th of *December*, 1844, can now be enforced against the Defendant. The Plaintiff claims the specific performance of this agreement and the payment of the money thereby secured. The Defendant denies its validity, but offers to pay what is due to the Plaintiff for his costs,

(a) 2 *Phill.* 562.

(b) 9 *Beav.* 182.

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costs, on the delivery of that bill and on its being taxed in the ordinary way.

Notwithstanding some difficulty that may arise from the *dicta* in some of the cases referred to on this subject, I am of opinion, that the settlement of a solicitor's bill by the client for a fixed sum is valid, and will not be disturbed by this Court, where it has been entered into fairly and with proper knowledge on both sides. Lord *Langdale* so decided in the case of *In re Whitcombe* (a); and also held in *Re Eyre* (b), that an agreement as to the mode by which a solicitor was to be remunerated would be properly taken into consideration by the taxing Master, and I have myself acted on this principle in the case of *In re Taylor* (c), which I lately decided.

The case of *Ex parte Bass, In re Stephen*, does not appear to me to oppose this view of the case. In that case, a large sum of money had been paid to solicitors, for the purpose of obtaining papers from them and under an agreement that this should finally settle all matters between them. Lord *Cottenham* ordered the bill to be delivered and taxed; but he did so, not, as it appears to me, on the ground that such an agreement could not, under any circumstances, be entered into between a solicitor and his client, but on the ground that the agreement in question was, in fact, extorted by pressure. The Lord Chancellor seems to have considered that the agreement, in that case, could not be put higher than payment of the bill; and that if payment had been extorted by such pressure, the client who had paid the bill, under such circumstances, would have been entitled to tax it. In fact, in that case, the very existence of the company seems to have depended on obtaining possession of the documents

(a) 8 *Beav.* 140.
 (b) 10 *Beav.* 569.

(c) *Feb.* 8, 1854, *post.*

ments in the custody of the solicitors and submitting to their terms.

But I see nothing in that case to countenance the opinion, that provided the transaction be open and fair and without pressure, a solicitor and his client may not agree that a fixed sum shall be paid to the solicitor, in liquidation of his bill of costs, even though that bill of costs has not been delivered, and even though the object of the arrangement is to enable the solicitor to escape the trouble of making out his bill.

I am also of opinion, that the circumstance that the money is to be paid at a future time does not alter the case, or make it, on that account alone, more invalid, than if a sum of money had been paid at the time. I adopt the observation of Lord *Langdale* in the case of *Whitcombe* (a) :—"An agreement like this between a solicitor and client, for taking a fixed sum in satisfaction for all demands for costs, is an agreement which may be perfectly good ; but this Court, for the protection of parties, looks at every transaction of this kind with great suspicion."

Looking at this transaction, therefore, with great suspicion, I proceed to consider, whether I ought to act upon and enforce it. The first question to be considered is, was it obtained by pressure on the client ? The solicitor refused to give up the papers unless this agreement was signed ; he had a perfect right to keep the papers until his bill was paid ; and on the other hand, the client, the Defendant, might, at any time, have taxed the Plaintiff's bill, and have obtained possession of the papers, if he had been in a position to pay the amount found due on taxation. I am of opinion, in this case, that the Defendant has not made out such a case of pressure.

That

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(a) 8 *Beav.* p. 144.

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That he required the papers is certain, and that he could not prosecute his claim without them is probable; and he certainly could not, without a considerable outlay, obtain new ones, if he failed in obtaining these. But I do not find, that the want of them was urgent, or that the Defendant would have been prejudiced by the delay in obtaining them, even though that delay should have amounted to several weeks or even months. The success of his claim did not depend on his obtaining immediate possession of them, as was the case in the matter of *Stephens*. This is a material difference, not to attend to which would be, in many cases, to defeat the value of the solicitor's lien. It is true, that the Defendant had no professional assistance in this matter, but I do not find that he was ignorant of what he was about. He was conversant with legal matters, he understood the agreement fully; he did not apply for further time to consider the matter, he believed, and stated his belief at the time, that the bill of costs could not amount to so large a sum. But admitting such to be the case, provided the disproportion was not so great as to amount to fraud, I am not prepared to say, that the amount really due would not be a sufficient consideration to support an agreement for the payment of a larger sum of money, depending on a contingency over which the solicitor had no control, which possibly might never arise, or if it ever did arise, would probably be at a distant period of time. It is next to be observed, that the Defendant has had the full benefit of the agreement; he obtained the papers, he prosecuted his claim and he succeeded.

It is true, that there is frequently a great difference between directing an instrument to be delivered up and compelling the parties to it to make it effectual; but in the view I take of this case, that difference does not
exist

exist here. If I am right in the construction which I, sitting in Equity, put on this agreement, the Plaintiff could recover upon it at Law. If he cannot, it must be owing to the use of an accidental expression in it, which confessedly was not intended by either party, at the time of its execution. I think, therefore, that I must consider how this case would have stood, if an action had been brought on this agreement, and the Defendant had instituted a suit to set it aside and had applied for an injunction to restrain the prosecution of the action. If that case were before me, I should have to consider, whether I could restore the parties to it to the position in which they were when it was entered into. This is manifestly impossible; as I have already observed, the Defendant has had the full benefit of it, and cannot restore to the Plaintiff what he obtained from him. The lapse of time is another circumstance in favour of the Plaintiff. It is true, that the evidence respecting the Plaintiff's books and the record kept of the Defendant's services is so unsatisfactory, that I am induced to believe, that the Plaintiff would have found it extremely difficult to have made out his bill of costs in *December, 1844*; still this difficulty must be increased and made totally insuperable after the lapse of nine years, and some weight is to be given to this consideration, although not to the extent that would be proper in an ordinary case, where the custody of previously existing vouchers might reasonably have been neglected by a person who considered the matter to be settled.

In addition to these considerations, I am not satisfied that the Defendant has not himself had the benefit of this claim of the Plaintiff, in the sums allowed him for expenses by his co-claimants, if I may use such an expression. On this point, however, the evidence is too uncertain

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uncertain to enable me to come to any conclusion without further inquiry: these, however, are minor matters.

I am of opinion, that the Plaintiff is entitled to the benefit of this agreement, on the grounds I have already stated, and which may be shortly recapitulated to be these:—that it does not appear to me that it was obtained by fraud or by undue pressure:—that the Defendant has had the full benefit of it:—that I cannot restore the parties to the position they were in, if I were to set it aside, or to refuse to act upon it:—and that if I left the Plaintiff to his remedy at law, I might possibly enable the Defendant to succeed on a technical point, in the wording of the agreement, which confessedly was not intended by either party at the time of its execution, and which does not appear to me to be its true construction.

The result is, that in my opinion, the Plaintiff is entitled to a decree for specific performance of the agreement, and payment of the money secured by it.

No costs.

In re MARKWELL's Legacy.

In re 10 & 11 VICT. c. 96.

In re 52 GEO. 3, c. 101.

Jan. 30, 31.

March 4.

The payment into Court under the Trustee Relief Act, prior to the Charitable Trusts Act, 1853, is not such "a suit or matter actually pending" as to relieve a party from the necessity of obtaining the assent of the Commissioners under the latter act to a subsequent application.

WILLIAM MARKWELL, by his will, dated 22nd of *February*, 1836, gave 1,200*l.* stock, after the death of his wife, *Jane Markwell*, to the clergyman,

man, churchwardens and overseer of the parish of *Holy Island*, in the county of *Northumberland*, and others, in trust to pay, out of the dividends thereof, two guineas yearly to the minister of *Holy Island*, for the time being, for preaching a sermon annually, and to apply the residue towards the education of the offspring of certain of his relatives therein named, and the education of as many poor children in *Holy Island* as the dividends would allow.

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The testator's widow died on the 31st of *July*, 1851, and on the 28th of *July*, 1852, the surviving executor of the will (who was also one of the trustees of the charity named in the will), paid the 1,200*l.* stock into Court, under the provisions of the Trustee Relief Act (10 & 11 *Vict.* c. 96). Afterwards (20th of *August*, 1853), the "Charitable Trusts Act, 1853," passed; the 17th section of which provides, that "before any suit, petition or other proceeding (not being an application in any suit or matter actually pending), for obtaining any relief, order or direction, concerning or relating to any charity, or the estate," &c. shall be commenced, &c., notice shall be transmitted to the Board of Commissioners, who may authorize it; otherwise no suit, petition, &c. shall be entertained by the Court.

A petition was presented in *October*, 1853, by the perpetual curate of the parish of *Holy Island*, and the trustees, under the 52 *Geo.* 3, c. 101 (Sir *Samuel Romilly's* Act), praying that the residue of the dividends, after payment of the two guineas, might be applied in increasing the efficiency of the parish school (which had been established in 1799, by public subscription), by the payment of an annual stipend to the master, and the outlay of part in the purchase of books; the offspring of the testator's relatives, named in the will, to
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be at liberty to attend the school, under proper regulations; and for a scheme.

Mr. *Grenside*, for the Petitioners. This petition is authorized by Sir *Samuel Romilly's* Act; but an objection has been taken to it, on the ground that it ought not to have been presented without the consent of the Commissioners of Charitable Trusts, it not being "an application in any suit or matter actually pending" within the exception in the 17th section of the Charitable Trusts Act (16 & 17 *Vict.* c. 137). The 1,200*l.* stock was paid into Court, by the surviving executor and trustee, to the account of "*William Markwell's* Stock Legacy;" and it is said, something more than mere payment into Court is necessary to constitute a "matter pending." But the whole matter had been discussed before the 20th of *August*, when the Charitable Trusts Act passed; it had been agreed that a petition should be presented, and everything had been completed, except the presentation of the petition, which was done in *October*. Even if this were not so, the case comes within the exception in the 17th section of the act, for the matter was pending as soon as the affidavit by the trustees had been filed, and the sum paid in. At all events, as to the two guineas to the minister of the parish for preaching a sermon, that is not a charitable trust, and would not be void under the Statutes of Mortmain. It is not a charitable, but a personal bequest to the minister; and to that extent, the Court has jurisdiction, notwithstanding the want of a certificate under the Charitable Trusts Act. The petition ought not, therefore, to be dismissed.

Mr. *Wickens*, for the Attorney-General. The point, though of no moment in itself, is of considerable importance with reference to proceedings under the Trustee Relief

Relief Act; for if the payment of money into Court, under the provisions of that act, is a proceeding within the 17th section of the Charitable Trusts Act, the necessary result would be, that persons merely wishing to pay money into Court under the Trustee Relief Act must, if the smallest portion of it be given to charity, previously ask leave of the Charity Commissioners. If no such proceeding could hereafter be taken by a trustee, without first obtaining leave, the protection intended to be afforded trustees, and the parties beneficially interested, by the Trustee Relief Act, would be materially abridged. To apply to the Commissioners in such cases would be an useless form, for they could not adjudicate. If the Court has now jurisdiction to proceed with the petition, it is not desired to object to its doing so; but the principle being of great importance, it would be better to allow the petition to stand over to be amended, by obtaining and inserting the approval of the Charity Commissioners.

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Mr. *Grenside*, in reply. The parties had gone far in forming a scheme, but had not quite completed it, when the Charitable Trusts Act came into operation (20th of *August*). The account of "*William Markwell's Stock Legacy*" is a matter pending. The act means all matters anyhow before the Court, and recognized as being in Court. A broad view should be taken of the act, and there could be no inconvenience in allowing this petition to proceed. Besides, this is not the case of an existing charity, but one which is now to be established; and the Charitable Trusts Act applies to charities now subsisting, not those to be established.

The MASTER of the ROLLS.

I think this is not a pending proceeding within the
words

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words of the act. All that is done by payment into Court, under the provisions of the Trustee Relief Act, is merely to substitute the Court for the trustee, to throw on the Court his responsibility, and leave the parties interested to take such steps as they may think proper to assert their rights. The words of the Charitable Trusts Act are:—"Before any suit, petition or other proceeding (not being an application in any suit or matter actually pending) *for obtaining any relief, order or direction,*" &c., the order or certificate of the Commissioners is to be obtained. But the trustee simply pays in the money, and does not seek any order, &c. respecting it; he is indifferent as to that, and only wants to get rid of his liability; and the application of the parties interested for payment out of Court of the money is alone required. If the trustee, indeed, did make that application there might be something in the argument, but he does not. Therefore let the petition stand over for the approval of the Charity Commissioners. As to the other point, respecting the payment to the minister of the parish not being a charitable gift, it may stand over till to-morrow morning, to give Mr. *Grenside* an opportunity of searching for authorities, and of mentioning it again.

January 31. Mr. *Grenside* mentioned the matter, but produced no authority, and no order was made.

March 4. The MASTER of the ROLLS, on the case being mentioned, and the leave of the Commissioners obtained, directed a statement, of what was intended to be done with the fund, to be submitted by the Petitioners to the Attorney-General; and, when approved of by him, to be left for the approval of the Master of the Rolls. He said he would then mention it on the first day of consent petitions.

1853.

CAMPBELL v. ALLGOOD.

Dec. 8, 12.

GEORGE HARTLEY, by his will, devised to *Robert Lancelot Allgood, Thomas Charge and John Brook* (since deceased), their heirs and assigns, all his real estate, upon trust to apply the same in aid of his personal estate (if insufficient) to pay his debts and the legacies thereby given; and after paying two annuities thereout, upon trust to pay one-third of the surplus rents and profits of his real estate to his sister, *Mary Campbell* (the Plaintiff), for her life, for her separate use, &c. &c.

The testator died in 1841, possessed, among others, of the *Middleton Lodge* Estate, consisting of a mansion and 144 acres of land, &c. After the testator's death, the Plaintiff occupied *Middleton Lodge* as tenant to the trustees down to *August*, 1848, when the trustees let it to *Edmund Backhouse*, who still occupied it.

At the testator's death, there were several ornamental trees growing upon the premises, which sheltered the house and walks, and hid the offices. The trustees had recently cut down several trees, particularly some beech trees and a large horse-chesnut, which sheltered the windows of the mansion-house and servants' hall, and which had been much prized by the testator; and they threatened, as alleged, to cut down more.

Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the Court for its authority; and the *onus* of showing that the trees are prejudicial lies on the trustees.

A perpetual injunction was granted against trustees, who cut down three ornamental trees, and failed in proving, to the satisfaction of the Court, that they were prejudicial to the residence.

A bill filed against trustees and the tenant to prevent equitable waste, was

The dismissed with costs as against the tenant, it


not being shown that he had committed or intended to commit any waste, though some had been committed by the trustees at his request.

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ALLGOOD.

The fact first came to the knowledge of the Plaintiff on the 5th of *November*, 1853, and on the 19th of the same month, she filed a bill, on behalf of herself and all other parties interested under the will of *George Hartley*, to restrain the trustees from cutting down the trees. The Plaintiff then applied for and obtained an *ex parte* injunction, which the Defendants did not seek to dissolve. The Defendants having put in their answer, the cause came on for hearing, and the Plaintiff now sought to have a perpetual injunction against the Defendants.

The Defendants, by their answer, stated, that the Plaintiff had herself, while in occupation, cut down nine trees, without any communication with them; that the kitchens and outbuildings were sufficiently protected by evergreens of large growth, from being seen by or exposed to the view of parties walking in the gardens and grounds; that the trees cut down tended to a great, but to a needless and injurious, extent, to prevent the kitchens and outbuildings being seen; that they had cut trees, but that they had had little effect in hiding the offices, which were low and concealed by the evergreens, and they denied that the beech trees formed an avenue to the offices. As to the chesnut and beech trees, that three of the beech trees and the horse chesnut stood at small distances from the house, and the chesnut spread over and blocked up the windows of the study, the housekeeper's rooms and servants' hall, and the bed-rooms above, and rendered them dark and damp, and the droppings from them on the roof, and the exclusion of sun and air, did great injury to the roof and walls; the timbers of the roof were decayed, the walls were damp and covered with fungi, and the paper was dropping off. That the trees overtopped the eastern wing, and overhung a portion of the roof, and acted as fans
on

on the chimneys, and occasioned down blasts and the chimneys to smoke. That they had consulted a plumber, who advised them to cut down the trees, and they accordingly cut down the chesnut and three beech trees, but refused to cut down another at Mr. *Backhouse's* request, because they thought it was ornamental, and did not appear injurious to the mansion-house. A good deal of evidence was gone into as to the situation of the premises, the size, breadth, &c. of the trees, their contiguity to the house, and the like.

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Mr. *R. Palmer* and Mr. *C. C. Barber*, for the Plaintiff, contended, that the trustees had no right to cut down the trees, or to exercise any discretion.

Mr. *Lloyd* and Mr. *Babington*, for the Defendants, the surviving trustees, said, that the Plaintiff had herself cut down trees and had no right to complain. That the trustees had exercised a wise discretion in cutting down these few trees for the benefit of the mansion and to keep a good tenant, and that they had refused to cut down other trees because they thought them ornamental. They cited *Marker v. Marker* (a).

Mr. *Faber*, for *Backhouse*. There is no evidence of *Backhouse* ever having cut, or threatened to cut, any trees on the property. He is a mere tenant, and ought not to have been mixed up in a dispute between his landlords and their *cestuis que trust*. The bill ought, therefore, to be dismissed, as against him, with costs.

Mr. *R. Palmer*, in reply, contended, that the trustees had no right to exercise any discretion. He complained that the same evidence had been taken twice in the cause ;

(a) 9 *Hare*, 1.

1853.

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 ALLGOOD.

cause; once on behalf of the trustees, and, secondly, on the part of *Backhouse*, and argued that this was an useless and unnecessary expense, which ought to be borne by the Defendants.

The following cases were cited, *Burges v. Lamb* (a); *Coffin v. Coffin* (b); *Morris v. Morris* (c); *Drewry on Injunctions* (d).

The MASTER of the ROLLS.

The question is, first, whether these trees are ornamental; and if they are, then whether, although ornamental, they are so prejudicial to the dwelling-house, as to render it proper that they should be cut. The difficulty, in all these cases, is on the question of fact, for there is so much difference of opinion as to the beauty and value of timber, that persons may very conscientiously come to an opposite conclusion.

In the first place, I am of opinion, that they were ornamental, and the real and only question is, whether they were so prejudicial to the mansion-house, that they ought to be cut. Though I think there is some slight discrepancy in the description of them in the affidavits, the evidence may be reconciled. The trees cut are, one horse-chesnut, which I think overhangs the roof of the house, and three beech trees; and the state of the case was this:—*Backhouse* was in treaty to take the house, but he refused to become tenant unless the trees were cut; and, after an inspection, the trustees, in accordance with his wishes, and to obtain a tenant, cut these trees. There is nothing like wanton destruction

OR

(a) 16 *Ves.* 180.
 (b) *Jac.* 70.

(c) 15 *Sim.* 505.
 (d) *Page* 144.

on the part of the trustees, who acted *bonâ fide*; nor were the trees cut for profit, for their value was only 13l. They were cut on the 15th or 16th of *September*, and the 13th of *October*, 1852, but the Plaintiff did not hear of it until the 5th of *November*. She then sent a person to ascertain the fact, and on the 19th of *November* filed the bill, and obtained an injunction on the 20th. One material ingredient, in this case, is, that no application has ever been made to dissolve the injunction, and the question now raised at the hearing might equally well have been discussed on a motion as at the hearing of the cause.

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Upon the result of the evidence, I think that these trees did form a shelter to and hide that part of the house, which, as it contained the offices, probably was the most unsightly. I am of opinion, also, that the horse-chesnut tree was, to some extent, prejudicial to the healthiness of the house, but I am not satisfied that such was the case with respect to the beech trees. The burthen of proof lies on the trustees, to satisfy me that they were prejudicial, for they had no authority to cut trees which were ornamental, and conducive to the beauty of the house. I think they ought to have applied, either to the persons interested in the property for their assent, or to the Court for its authority for cutting these trees; and as they have not satisfied me that it was*absolutely necessary for the well being, salubrity and comfort of the residence, that these trees should be cut, I think I must grant an injunction. I am confirmed in this by the fact, that the tenant has applied to the trustees to have another tree cut, and it is said, that there are more trees and evergreens which ought to be cut. When that application was made does not appear. The answer says, "lately;" and as I must take this most strongly against

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the pleader, I must assume it to have been after the bill had been filed, and when they were prevented complying by the existing injunction. Finding, therefore, that there are other trees, which the tenant is desirous to have cut, and which some persons think it desirable should be cut, and that the parties interested are desirous to preserve, I think that the Plaintiff had reason to be alarmed, and that there were sufficient grounds to entitle her to apply to this Court for an injunction.

I see no case against *Backhouse*, the tenant, who has neither cut nor shown any intention to cut trees. Though he thinks that the absence of the trees would be a great improvement, still there is no evidence to show that he intends to cut any trees; on the contrary, his application has properly been made to the trustees, his landlords, to cut. The bill must be dismissed with costs, as against *Backhouse*, because the only thing sought against him by the bill is an injunction, which, on the evidence, the Plaintiff is not entitled to. I disapprove of the same evidence being given twice over, once for each defendant; but as the bill prays an injunction against *Backhouse*, he might reasonably have been advised, that he could not safely come to a hearing without evidence, although I think he might have rested on the simple fact, that he had neither cut nor threatened to cut trees. Though I think the trustees must pay the Plaintiff's costs, still I cannot allow her to add *Backhouse's* costs to her own.

Mr. *Lloyd* asked, that the costs might come out of the estate, as the trustees had acted *bonâ fide*, which not being opposed,

The MASTER of the ROLLS said, I think so. There is evidence that the Plaintiff herself, when in possession, cut down several trees on the estate.

AN
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THE PRINCIPAL MATTERS.

ABANDONMENT.

A. and *B.* had charges on a plantation and the slaves. In 1834, an issue was tendered, in a suit between them, as to their priority on the slave compensation money. *B.* withdrew his claim, and the bill was, on motion, dismissed. Sixteen years afterwards, when the witnesses were dead, *B.*'s executors raised the same question of priority in regard to the plantation itself. Held, that they were concluded by the transactions of 1834. *Bushby v. Ellis.* Page 279

ABSOLUTE INTEREST.

1. A testatrix by her will directed her executors to pay to *M. S.* or her assigns, or permit her to receive the income of her residuary personal estate after payment of debts, and she then bequeathed

certain legacies payable after the death of *M. S.* By a second codicil, she gave a legacy payable after the death of *M. S.* Held, that *M. S.* took an absolute interest in the residuary personal estate. *Jenings v. Baily.* Page 118

2. Bequest "to *A.*" (who was *enccinte* at the time) "and her children." Held, that *A.* and her children took as joint tenants, and no child having survived the testator, that *A.* was absolutely entitled to the legacy. *Mason v. Clarke.* 126
See ELDEST SON.

ABSTRACT.

Distinction between showing a good title on the abstract, and verifying it. *Sherwin v. Shakespeare.* 267

ACQUIESCENCE.

See CANAL.

ADEPTION.

A testator bequeathed "the principal sum" secured to him by a mortgage in fee. It was afterwards voluntarily paid off in the testator's lifetime. Held, that the legacy was adeemed. *Phillips v. Turner.* Page 194

ADMINISTRATION.

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ADMINISTRATION SUIT.

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ADMINISTRATOR.

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ADULTERINE BASTARDY.

The child of a married woman held to be illegitimate, on proof of non-access of the husband, and of conduct and admissions of the wife and her paramour. *Re Sinclay.*

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See CHARITY, 3.

INJUNCTION, 3.

SET-OFF.

AFFIDAVIT.

See EVIDENCE, 3.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

1. A husband agreed to pay a sum of money, on his being held next of kin of *A. B.* and entitled to his property. The wife was and claimed to be such next of kin. The husband having succeeded in right of his wife, the Court held that there was an error and mis-

take in the agreement, which ought to be rectified, and decreed the husband to make the payment. *Stedman v. Collett.* Page 608
See SOLICITOR AND CLIENT, 2, 3, 4.

AMENDMENT.

The common order to amend may be obtained after a claim has been set down for hearing. *Gwynne v. The British Peat, Charcoal, and Manure Company.* 7

ANNUITY.

A testator directed his executors to purchase, in their names, an annuity from government or any public company, for *A. B.* Held, that *A. B.* was entitled to have a government annuity purchased, and, at his option, to take the price in lieu of the annuity. *Ford v. Batley.* 303
See ARREARS.

ANSWER.

See PLEA, 1, 2.

ARREARS.

A testatrix directed her trustees to levy and raise, out of the interest, dividends and annual produce of certain trust funds, an annual sum of 100*l.*, and pay the same to *R. P.* during his life; and, "subject and without prejudice to the payment of the said annuity," to pay the income of the trust funds to *F. C.* for life, and after his decease, "subject and without prejudice, as aforesaid," to stand possessed of the trust funds for other persons. The income of the fund

was insufficient to pay the annuity. Held that such arrears were a charge upon the *corpus* of the trust property, and that the tenant for life was only bound to keep down the interest of such arrears. *Playfair v. Cooper, Prince v. Cooper.*

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ATTAINDER.

See HOSPITAL.

ATTORNEY-GENERAL.

The Attorney-General attended in a cause to which he was not a party, to support a claim for legacy duty upon a fund in Court. The claim failed: Held, that the Crown was not entitled to costs. *Hobson v. Neale.*

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BANKRUPT.

See ESTATE TAIL.

BANKRUPTCY.

See HUSBAND AND WIFE, 4.

BARON AND FEME.

See HUSBAND AND WIFE.

BASTARDY.

See ADULTERINE BASTARDY.

BENEFICE.

A benefice is not made spiritual because it can only be held by one in holy orders. A hospital for poor without cure of souls is a lay foundation, although the master is required to be in holy orders. *Attorney-General v. St. Cross Hospital.*

435

BEQUEST.

1. A testator gave his real and personal estate to his sister for life, and if she should have any family living at her decease, they should have "their due proportion of the property; and in case of the demise of his sister's children, his two nephews were to stand in the same situation as his sister's children would have stood had they been living." Held, that such only of the nephews as survived the sister and the children took, and one of the nephews having died in her lifetime, that the other nephew was entitled to the whole residue. *Lewis v. Lewis.*

Page 221

2. A testator "devised and bequeathed his lands and property whatsoever in Australia," together with the arrears of rents, to A. and B., "their heirs and assigns," and he gave the residue of his estate and effects to C. Held, that his personality in Australia passed under the first gift. *Robinson v. Webb* 260

See SPECIFIC LEGACY.

SUBSTITUTION.

WILL.

BILL OF COSTS.

See EVIDENCE, 1.

TAXATION.

BREACH OF TRUST.

See CHARITY, 2.

DEVASTATION.

EQUITABLE WASTE.

INTEREST, 3.

VISITOR.

CANAL.

In 1794, an act authorized the making of a public canal through lands, of which *A.* was the owner and *B.* his lessee, and, upon payment of the compensation, the land was to vest in the company. An arrangement was made in respect of compensation with *B.* but not with *A.* The canal was made "with the full consent and approbation of and in accordance with the wishes of *A.*," whose name was mentioned in the act, and it was enjoyed until the expiration of the lease in 1844. The representatives of *A.* then recovered at law the land taken for the canal. Held, in equity, that *A.* having thus sanctioned the formation of the canal, was not entitled to retake possession, but only to a fair compensation, to be determined by the agricultural value of the land taken, as calculated in 1844, and not in 1794. Held, secondly, that persons who had bought *A.*'s property with notice of the conditions of sale as to the canal were equally bound by the same equity. Held, thirdly, that this Court might itself determine the amount of compensation. *The Duke of Beaufort v. Patrick.* Page 60

CHANTRIES.

See HOSPITAL.

CHARGE ON REAL ESTATE.

Whether a mere charge of debts gives to the executor a power of sale by implication, *quære*? *Robinson v. Lowater.* 592
See TRUSTEES' RECEIPTS.

CHARITABLE TRUSTS ACT.

The payment into Court under the Trustee Relief Act, prior to the Charitable Trusts Act, 1853, is not such "a suit or matter actually pending" as to relieve a party from the necessity of obtaining the assent of the commissioners under the latter act to a subsequent application. *In re Markwell's Legacy.* Page 618

CHARITY.

1. Where the origin of a charity or a right is lost in obscurity, the Court will presume, from the uniformity of the practice or use, that it is in accordance with the original foundation or right, and will presume whatever may be necessary to give it validity; but no such presumption can arise, from practice for a very long period, if an origin contrary to such practice is proved. *Attorney-General v. St. Cross Hospital.* 435
2. The Hospital of *St. Cross*, the origin and foundation of which were unknown, was refounded and endowed for the maintenance of thirteen poor and impotent men (with relief to other poor according to the means of the house), under the government of a master, who was to be appointed by the Bishop of *Winchester* for the time being. Within the precincts of *St. Cross* another foundation, called *Noble Poverty*, was established for two priests, thirty-five brethren and three sisters, but no charter was now in existence, and it had long since been practically united to *St. Cross*. In 1696, a document called

the *Consuetudinarium* was drawn up, declaring the master to be entitled to the surplus revenues, after providing for a limited number of poor and the repairs of the house. Held, that it was inconsistent with the objects of the charity and the clear intentions of the founders, and that the jurisdiction of the Court to compel the due performance of the charitable trust was not taken away, though the founder had appointed a special or general visitor. *Attorney-General v. St. Cross Hospital.* Page 435

3. Part of the property of a foundation school consisted of an advowson producing no income. The Court considered, that, if the parish were within a reasonable distance and the duties of it light, the living might properly be held by the master or usher, but that not being the case, the advowson was ordered to be sold for the benefit of the charity, which the Court considered it had jurisdiction to order. *Attorney-General v. The Archbishop of York.* 495
4. The statutes of foundation of a school (1548) directed that the rents of the charity property should not be raised above the yearly rents then payable. Held, that this direction was simply inoperative, and that the most must be made of the property. *Ibid.*
5. The provisions in the statutes of foundation, as to the period of attendance of the master, may be modified by the Court in settling a scheme. *Ibid.*
6. In the absence of express direc-

tions, it is not incumbent on the schoolmaster to reside in the school-house, provided he live within a convenient distance, *semble.* *Attorney-General v. The Archbishop of York.* Page 495
See BENEFICE.

CHARITABLE TRUSTS ACT.

CHARTER OF FOUNDATION.

COSTS, 7.

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CHARTER OF FOUNDATION.

Where the original charter of foundation of a charity does not exist, but copies of it are found in proper places, two of them purporting to be the original charter *in extenso*, and one omitting certain trusts found in the other two, the former must be acted on, though it appears the property of the charity was afterwards diminished, and it is alleged that in consequence thereof the visitor, under the authority given by the original charter, may have limited the trusts as shown in the third copy. *Attorney-General v. Archbishop of York.* 495

CHEQUE.

1. A testator, on his death-bed, gave his wife his cheque for 1,000*l.*, saying, "she would want money before his affairs were wound up, and that the gift was to be for her sole use, besides what she should receive from his estate." The cheque being crossed was exchanged some days after for a friend's cheque of the same amount, in favour of the wife. The testator stated to his friend, that he wished to give his

- (the friend's) cheque to her, and she received and kept it till after her husband's death. The testator's cheque was paid before his death, but his friend's cheque, which was post-dated and also crossed, was exchanged for another, and was duly paid after the testator's death. Held, that this constituted a valid gift of the 1,000*l.* by the husband to the wife, and formed no part of the testator's estate. *Bouts v. Ellis*. Page 121
2. Held, also, by the Lords Justices, that it constituted a good *donatio mortis causâ*. *Ibid*.

CLAIM.

See AMENDMENT.

CLASS.

Bequest to *A. B.* for life, and after his death to "all the present born children of *A. B.* equally." One of them died between the date of the will and the death of the testatrix. Held, that his share did not lapse, but that the bequest, being to a class, the whole was divisible amongst those who survived the testatrix. *Leigh v. Leigh*. 605

COMPANY.

1. Upon the formation of a company, the directors, and the persons who take shares, are contracting parties, and the prospectus and advertisements issued by the directors are the representations "*quæ dant locum contractui*." If these be false, and cannot be made good by the persons making them, the

contract may be avoided. It has, however, to be considered, whether it is reasonable to believe, that if the real truth had been stated, the shares would not have been taken.

Jennings v. Broughton. Page 234

2. In suits to set aside contracts on the ground of misrepresentation, the burthen lies on the Plaintiff of proving that the representations were false, and that he acted on the faith of them. *Ibid*.
3. Upon a bill by a shareholder against the projectors and lessees of a mining company to rescind the contract and return the shares, on the ground of misrepresentation in the prospectus: Held, upon the evidence, that although it stated, in glowing and exaggerated colours, what was really in the mine, yet these were not such misrepresentations as to avoid the contract. Held, also, that the same sources of information were open to the Plaintiff and Defendant, and that they availed themselves of them, and the bill was dismissed with costs. *Ibid*.

See CONTRIBUTORY.

RAILWAY.

SPECIFIC PERFORMANCE.

COMPENSATION.

See CANAL.

CONDITIONS OF SALE.

If conditions of sale simply state the facts, and stipulate that the purchaser shall take such title or such interest as the circumstances detailed would confer upon him and no other, the purchaser must ac-

cept it, whatever it may be ; but if they go on to state, not as a conclusion of law from the circumstances detailed, but as a positive fact, that the vendors have power to sell the fee, the purchaser is not precluded from inquiring whether the vendors have anything to sell, as their power so to do may have arisen from separate and independent sources. *Johnson v. Smiley.*

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See VENDOR AND PURCHASER, 1.

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CONTRIBUTORY.

Executors who, after the death of their testator, had purchased further shares, held, as to the latter, to be contributories without qualification, though they had been treated as executors in regard to such further shares. *Spencer's case.—Re Newcastle, &c. Banking Company.* Page 203

CONVERSION.

1. A testatrix gave her real and personal estate to three trustees, upon trust, as soon as they, in their discretion, should think most advantageous, to sell and convert into money her real estate, and pay her debts and legacies. She gave the residue of her estate and effects to her son *J. B.* Held, that *J. B.* took the residue of the realty in

- the character of personalty. *Griesbach v. Fremantle*. Page 314
2. *A. B.*, who was one of the trustees, paid the debts and legacies, except one annuity, and remained in possession sixteen years and died intestate. Held (having regard to his acts, and notwithstanding he was both co-trustee and owner), that the property was reconverted into realty and passed to his heirs. *Ibid.*
 3. Where real estate is bequeathed in the character of personalty, and it is enjoyed unconverted by the legatee, slight circumstances are sufficient to raise a presumption that he has elected to retain it as realty. In the absence of any other circumstances, the fact that a person has, for a great length of time, preserved the property in its actual state, will be sufficient to induce the Court to come to this conclusion. *Dixon v. Gayfere*. 433
 4. *A. B.*, being entitled to an undivided share in a real estate impressed with the character of personalty, retained possession for between two and three years, and died without having said or done any thing to indicate an intention to reconvert. Held, that, at his death, it was personalty. *Ibid.*
See PERISHABLE PROPERTY.

CO-PLAINTIFFS.

1. Co-Plaintiffs must act together, and cannot take inconsistent proceedings. *Wedderburn v. Wedderburn*. 158

2. One of several co-Plaintiffs moved for liberty to take a state of facts into the Master's office, and proceed thereon apart from the rest. The motion was refused with costs. *Wedderburn v. Wedderburn*.

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COPYHOLD.

See ESTATE TAIL.

CORPORATION.

See RAILWAY, 1, 2, 3.

COSTS.

1. When a vendor succeeds in a suit for specific performance, he is entitled to costs, notwithstanding the title was first shown in the Master's office, if the suit was occasioned solely by the conduct of the Defendant. *Peers v. Sneyd*. 151
2. A purchaser having unsuccessfully insisted, that an instrument of republication did not sufficiently refer to the will, so as to identify it, no costs were given on either side, on a bill for specific performance, by vendor, who had not made out his title. *Weddall v. Nixon*. 160
3. An administrator settled with three out of four next of kin, and the fourth having instituted a suit for administration, held that his share only was liable to one-fourth of the costs. *Holgate v. Haworth*. 259
4. On a special case, the costs follow the same rule as in administration suits, and are payable out of the general residue; and if there be none, out of the property speci-

Cookson v. Bing-
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TAXATION.

TENANT, 1.

TENANT FOR LIFE.

TRUSTEE ACT, 13 & 14 *Vict.* c. 60.

COVENANT TO SETTLE.

Covenant to settle after-acquired property of the wife, held to ex-
property acquired after the
the husband. *Stevens v.*
Page 305

and wife covenanted to
est in the trustees of their settle-
ment, upon the trusts thereof, "all
property which should come to her
absolutely, and not bound by any
trust or provision, otherwise than
for her absolute use." Held, that
property bequeathed to her "for
her separate use absolutely" was
bound by the covenant. *Milford*
v. Peile. 602

3. Held, secondly, that leaseholds
and chattels bound by the covenant
were to be enjoyed *in specie* and
unconverted. *Ibid.*

See MARRIAGE SETTLEMENT.

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CREDITORS' SUIT.

A creditors' suit was instituted in
1803, and in 1806, the usual decree
was made, and a sum was paid into
Court. The suit became defective
in 1807, by the death of the per-
sonal representatives of the debtor,
and the decree was not prosecuted.
In 1853, the representatives of the
Plaintiff, having revived the suit
against the administrator *de bonis*

one
decree was
to the other
axing Master con-
suit to be for two ob-
d allowed the Plaintiff one-
of the general costs com-
both. Held, that he was
Hardy v. Hull. 355
ing costs out of charity pro-
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sinking fund. *Attorney-*
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a suit to displace *A. B.*
e) for misconduct, he un-
wer appointed *C. D.* a new
C. D. had notice that the
ue trust complained of ir-
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as about to leave the coun-
long while. At the hear-
B. and *C. D.* (he not ob-
were discharged from the
eld, that *C. D.* was entitled
ts. *Peatfield v. Benn.* 522

non of the debtor, petitioned for payment of his debt out of the money in Court. The Court gave leave to prosecute the decree as to the debts. *Forster v. M'Kenzie, Forster v. Menzies.* Page 414

CROSS-EXAMINATION.

A motion for a decree, under the 15 & 16 *Vict.* c. 86, s. 15, is a proceeding within the meaning of the 40th section of the same act; and therefore, for the purpose of such a motion, the Defendant may cross-examine the Plaintiff. *Williams v. Williams.* 156

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See HOSPITAL.

CUSTOM.

See CHARITY, 1.

CUSTOMARY PART.

See CUSTOM OF LONDON.

CUSTOM OF LONDON.

1. The widow of a freeman of *London* is barred of her customary part by an ante-nuptial settlement, whereby the parents of husband and wife make provision for her after the death of her husband, of which she takes the benefit. *Hutchinson v. Newark.* 393
2. The same rule applies though the wife be an infant on the marriage and the husband becomes a free-man afterwards. *Ibid.*

DEBTOR AND CREDITOR.

See SET-OFF.

DECREE.

See CREDITORS' SUIT.

DEED.

See EVIDENCE, 1.

NEXT OF KIN, 1, 2.

DELAY.

See VENDOR AND PURCHASER, 2, 3.

DEMURRER.

When a demurrer has been overruled, and an appeal from the order is pending, an *ex parte* order to amend is irregular; and a Plaintiff having obtained such an order, after he had notice that the appeal had been set down, it was discharged with costs, and the amendments were expunged. *Ainslie v. Sims.* Page 174

DESCRIPTION.

See LEGATEE.

DEVASTAVIT.

About a year after a testator's death, the executrix brought an action against a debtor and recovered judgment, but she did not issue execution until a year after, when a bankruptcy ensued and the debt was lost. The executrix was empowered "to compound or allow time for the payment of any debt." Held (under the particular circumstances), that she was not liable for a *devastavit*. *Ratcliffe v. Winch.* 217

DEVISE.

1. The word "estate," in a will, will *prima facie* pass real estate, and the burthen of proof lies on those who contend the contrary. *Patterson v. Huddart.* 210
2. In a gift to *A.* (without any limi-

tation of interest), "and if he should happen to die leaving lawful issue," then to such issue, the contingency has reference to the death of *A.* and not to that of the testator. *A.*, therefore, does not take an absolute interest. *Gosling v. Townshend.* Page 245

3. A devise of property in *Bullen Court, Strand, and Maiden Lane*, in the "County of *Middlesex*," held to pass property in *Bullen Court*, and in the *Strand*, and in *Maiden Lane.* *Gauntlett v. Carter.* 586

See EJUSDEM GENERIS.

ESTATE IN FEE.

JOINT TENANCY, 3.

STATUTE OF WILLS.

WILL.

DISCOVERY.

Though a party may now at law examine his opponent, he is still entitled to a discovery in equity in aid of his case at law. *Lovell v. Gallonay.* 1

See INJUNCTION, 2.

INSPECTION OF DOCUMENTS.

PLEA.

PRODUCTION OF DOCUMENTS.

DISMISSAL.

A suit stood dismissed for want of prosecution, in consequence of the Plaintiff not serving a *subpœna* to hear judgment within the time limited by an order to speed. The Plaintiff moved to stay the taxation of the costs of suit. Held, that the motion ought to have been to restore the bill; and that although the Court would feel in-

clined to grant indulgence in the case of a *bond fide* mistake, yet that it was not to be extended to such an extent as to encourage parties in proceeding negligently with their suits. *Bartlett v. Harton.* Page 479
See PRACTICE.

DONATIO MORTIS CAUSA.

See CHEQUE.

DOWER.

See STATUTE OF LIMITATIONS, 6.

DYING WITHOUT ISSUE.

See STATUTE OF WILLS.

EJUSDEM GENERIS.

A testatrix, after giving pecuniary and specific legacies, and after directing her charity legacies to be paid out of her personal estate, "gave and bequeathed" all the rest "of her estate and effects, whatsoever and wheresoever, and all her diamonds and other jewels," to trustees, their "executors and administrators," upon trust to sell and divide. Held, that the real estate passed to them. *Patterson v. Huddart.* 210

ELDEST SON.

A testator gave the income of his property to *F.* and two other persons successively for life, and on the death of the survivor, he gave all his property to the eldest son then living of *W.*, his executors, administrators and assigns.

W. had three sons, of whom *W. W.* was the eldest. The testator by a codicil revoked so much of his will as related to *W. W.*, "and left *F.*, on the death of the tenants for life, in the full enjoyment of all his property." Held, that the gift to *F.* in the codicil enlarged his life estate into absolute ownership, and being inconsistent with the gift to the eldest son of *W.*, revoked it, whether the revocation of the gift to *W. W.* operated as a revocation of the gift to the "eldest son of *W.*" or not. *Wells v. Wells.*

Page 490

ELECTION.

A husband, who was entitled to family jewels and diamonds, bequeathed to his wife all "his" jewels for life, and afterwards as heir-looms. Held, that this bequest did not include pearl ornaments presented to her, or brilliant bracelets bought by the husband and given to the wife and worn with the family jewels, so as to put the wife to her election. *Jervoise v. Jervoise.*

566

ELEGIT.

1. A tenant by *elegit* took a conveyance of part of the lands extended, in satisfaction of part of his debt. Held, that his tenancy by *elegit* on the rest of the lands was extinguished and that his judgment was satisfied. *Hele v. Lord Bexley.* 14
2. A creditor issued three *elegits* on three several judgments, and extended the lands of his debtor; he afterwards took a conveyance of part of them. On a question whe-

ther the tenancy by *elegit* had been wholly extinguished and the judgment satisfied, the creditor insisted, that it had not been shown that the writs of *elegit* had been duly returned, and that no evidence had been given to show in respect of which *elegit* the lands conveyed had been extended. But held, that the *onus* of proof was on the creditor, he being bound to make out that he was a subsisting incumbrancer; and, secondly, that as it was his duty to have caused a proper return to be made and filed, that he could not take advantage of his own omission. *Hele v. Lord Bexley.*

Page 14

3. A creditor issued three *elegits* under three judgments, and the sheriff, by virtue of the first two, extended the whole of a leasehold estate, and returned *nil* to the third. The first two judgments being adjudged to have been satisfied at the time, held, that the creditor had acquired no rights under his *elegits.* *Ibid.*
4. *A. D.*, being entitled to three annuities secured by covenant and judgment, received for twenty years part of the rents of the grantor's estates under *elegits* issued on satisfied judgments. Held, that he was not accountable for his receipts to a party having a charge on the estate, who had taken no proceedings to obtain possession. *Ibid.*

ENCOURAGING EXPEDITION.

See CANAL.

ENJOYMENT IN SPECIE.

See COVENANT, 3.

PERISHABLE PROPERTY.

EQUITABLE WASTE.

1. Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the Court for its authority; and the onus of showing that the trees are prejudicial lies on the trustees. *Campbell v. Allgood.* Page 623
2. A perpetual injunction was granted against trustees, who cut down three ornamental trees, and failed in proving to the satisfaction of the Court that they were prejudicial to the residence. *Ibid.*

ESTATE.

See DEVISE, 1.

ESTATE IN FEE.

1. A devise to A. and his "lawful heirs" creates a fee and not an estate tail. The addition "lawful" in no degree affects the word "heirs," for the qualification of being "lawful" is implied in the word "heirs." *Mathews v. Gardiner.* 254
2. Devise to testator's daughter "and her lawful heirs," "but in case she should not happen to leave any child," then to his nephew and his heirs. Held, that the daughter took a fee simple, with an executory devise over to the nephew. *Mathews v. Gardiner.* 254

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3. Devise of "my landed estate in *Westmoreland*," with their appurtenances, and all allotments of common now inclosed, to the testator's three daughters, "to be jointly and equally enjoyed or divided in case of marriage of any of them, and they or the survivor in case of death, are hereby fully authorized to dispose of the same by will or assignment." Held, that the first words gave the fee, and the second created a joint tenancy, and that the survivor alone had power to devise. *Cookson v. Bingham.* Page 262
See REMOTENESS.

TENANCY IN COMMON, 1.

ESTATE TAIL.

A tenant in tail in remainder of copyholds became bankrupt, and by the custom, the entail could not be barred until it fell into possession. The bankrupt obtained his certificate, and purchased of his assignees his life estate only. On the subsequent death of the tenant for life, held, that the assignees had then no power to bar the entail and acquire the remainder in fee, subject to the life estate sold to the bankrupt. *Johnson v. Smiley.* 223

See ESTATE IN FEE.

EVIDENCE.

1. A married woman was alleged to have executed an appointment in 1800, and to have destroyed it.

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In 1813, disputes having arisen between her and the appointees, she and her husband executed a deed of compromise, which recited the appointment of 1800, and that she had destroyed it. Held, in a contest between the appointees and a party claiming under her will, that the deed of compromise was admissible in evidence, as was also the draft bill of costs of her solicitor and a draft of the deed of 1800, found in his possession. Held, also, that this evidence (after a lapse of forty years) established the fact of her execution of the appointment in 1800. *Dine v. Costobadie*. Page 140

2. Observation, that the interest of a witness is apt to mislead his recollection. *Griesbach v. Fremantle*.

314

3. When the evidence in a cause is taken orally, a general application, under the 36th section of the 15 & 16 Vict. c. 86, to be at liberty to use at the hearing affidavits already filed, is irregular. The particular facts or circumstances proposed to be proved by affidavits should be specified both in the notice of motion and in the order. *Ivison v. Grassiot*. 321

See ADULTERINE BASTARDY.

CHARITY, 1.

CHARTER OF FOUNDATION.

CROSS-EXAMINATION.

PRESUMPTION.

WILL.

EXECUTION OF POWER.

See POWER.

EXECUTOR.

Where a bequest is made by *A.* to the executors of *B.*, such executors hold it in trust, and to be administered as part of *B.*'s assets. The persons who take it beneficially take as *cestuis que trust*, and not as *personæ designatæ*, and it may belong either to the creditors, or the pecuniary or residuary legatee or next of kin of *B.*, according to the circumstances. *Long v. Watkinson*. Page 471

See CONTRIBUTORY.

DEVASTAVIT.

PAYMENT INTO COURT.

REVOCATION.

EXECUTORY DEVISE.

See "OR" READ "AND."

EXECUTORY TRUST.

See COVENANT.

SETTLEMENT.

EXHIBITIONS.

See SCHOOL.

FORECLOSURE.

1. A decree for foreclosure being made, the mortgagee, after the accounts had been taken, incurred further costs in another proceeding. Held, that he could not, by petition, obtain an order to add them to his security. *Barron v. Lancefield*. 208
2. The relief to which a judgment creditor is entitled, under the 1 & 2 Vict. c. 110, is a foreclosure, and not a sale. *Jones v. Bailey*. 582

FORFEITURE.

See MARRIAGE.

PRESUMPTION, 1.

FRAUD.

See COMPANY.

MISREPRESENTATION.

POWER, 1, 2, 3.

FREEMAN.

See CUSTOM OF LONDON.

GIFT.

See CHEQUE, 1.

GRANT.

Grants by the Crown are construed favourably to the grantor, and in such a case the usual rule, as to the construction of grants, is inverted. If it be shown that the King is deceived in his grant, it will not include a subject-matter not expressed. *Attorney-General v. Exelme Hospital.* Page 366

HEIR AND NEXT OF KIN.

See CONVERSION.

HOSPITAL.

In 1437, an almshouse or hospital was founded and endowed by the lord of the manor of *Exelme*, for thirteen poor men, two priests, for praying for souls and the education of youth, and the right of nominating the master was vested

in the lord of the manor for the time being. Previous to 1513, the manor and the rights of patronage became, on the attainder of the lord, forfeited to the Crown. In 1618, King *James* the First, by letters-patent, granted the right of nomination of the master to the University of *Oxford*, for the support of the Regius Professor of Medicine, and in 1818, the manor, with all its advantages and endowments, was duly granted by the Crown to *J. B.* The following points were held.

First, that the rights of nomination and visitation, incidental to the manor, did not, upon the forfeiture by attainder, become merged and extinguished, but vested in the Crown.

Secondly, that the property, &c., of the hospital were not affected by the statutes for the dissolution of monasteries (27 *Hen.* 8, c. 28, and 31 *Hen.* 8, c. 13), but remained vested in the Crown as before.

Thirdly, that they were not in any degree affected by the act respecting chantries (1 *Edw.* 6, c. 14), so as to vest the property in the Crown, as its *quasi* "probate possessions."

Fourthly, that the founder, by annexing the right of nomination to the manor, could not and had not made them inseparable; but that the right of patronage was in the nature of a lay advowson, which the lord might alien without parting with the manor, and the converse.

Fifthly, that by the grant of King *James* to the University of *Oxford*, the *jus patronatus* had, *de facto*, been severed from the manor of *E*.

Sixthly, that by the common law, the grant of a manor by the King *cum pertinentibus* would pass an advowson appendant to it, and that the statute 17 *Edw. 2*, c. 15, created a restriction as to advowsons of churches only and did not apply to the present case of a lay advowson. *Attorney - General v. Emelme Hospital*. Page 242

HUSBAND AND WIFE.

1. A married woman was entitled to 60*l.* in Court, but, on her marriage, she was indebted to the extent of 100*l.*, which had been proved under the husband's bankruptcy. Held, that the assignees were entitled to the whole fund. *Bonner v. Bonner*. 86
2. Upon the consent of a married woman, 377*l.*, to which her husband was entitled in her right, was ordered to be paid to him. He had been insolvent eighteen years previously, and his assignee having claimed the money, the order was rescinded and the whole fund ordered to be settled, notwithstanding the opposition of the assignee. *Watson v. Marshall*. 363
3. To save expense, the terms of settlement of a small sum were embodied in the order. *Ibid.*
4. Three-fourths of a legacy of 400*l.* belonging to a wife (after payment of the costs) settled as against a particular assignee of the fund,

the husband having nine years before become bankrupt; and *semble*, that the whole would have been settled but for negotiations between the parties for several years, which had involved the assignee in considerable expense. *Walker v. Drury*. Page 482

5. The savings of a wife's separate estate were invested in the joint names of husband and wife. The fund was afterwards applied in the purchase of a real estate. After the death of the husband, the Court, on the evidence, held, that the estate belonged to the wife. *Darkin v. Darkin*. 578
6. Two promissory notes, and a gas share, were left to a *feme sole* for her separate use. She married, but they were not settled, and they were subsequently transferred into the name of the husband. There being written recognitions of the husband that they were the wife's, held, after his death, that they belonged, as separate estate, to her. *Ibid.*

See AGREEMENT.

COVENANT.

CUSTOM OF LONDON.

MARRIAGE SETTLEMENT.

SEPARATE ESTATE.

SETTLEMENT.

INJUNCTION.

1. Practice under the statute in cases of injunctions to stay proceedings at law. *Lovell v. Gallonay*. 1
2. Where the Plaintiff in a bill of discovery in aid of a defence at

law has a *bond fide* case, verified by affidavit, showing that information may be given by the answer which may assist him in wholly or partly destroying the case made against him at law, he is entitled to that discovery and to an injunction until the discovery is given. *Lovell v. Galloway*. Page 1

3. On the principle of protecting property pending litigation, the Court will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a Defendant claiming to be purchaser for valuable consideration without notice under it. *Greenslade v. Dare*. 502
See EQUITABLE WASTE.

PATENT.

INSPECTION OF DOCUMENTS.

An order gave liberty to the "Plaintiff, his solicitors or agents," to inspect documents in the Defendant's possession. Held, that this did not authorize the inspection by a non-professional relative of the Plaintiff, though alleged to be the only person conversant with the accounts. The Court also refused to make a special order permitting the inspection by such party. *Summerfield v. Pritchard*. 9
See PRODUCTION OF DOCUMENTS.

INTEREST.

1. Interest on arrears of rent and an apportionment, as between landlord and tenant, disallowed. *Peers v. Sneyd*. 151

2. On the sale of an advowson, the purchase-money was to be paid on a fixed day, and the conveyance to be executed, but, in default of payment, the purchaser was to pay interest. The purchase was not completed, through the default of the vendor. Held, that no interest was payable. *Weddall v. Nixon*. Page 160

3. An administrator unnecessarily retained a balance of 3,700*l.* in his hands for three years. He was charged with interest, but was allowed his costs of an administration suit. Held, also, that the pendency of a suit for administration in the Duchy Court of *Lancaster*, during the time, was no justification for the non-investment. *Holgate v. Haworth*. 259

INTEREST ON PURCHASE-MONEY.

1. Principle of the decision in *De Visme v. De Visme* (1 *Hall & Tw.* 408; 1 *Macn. & G.* 336) explained. *Sherwin v. Shakspeare*. 267
2. A condition, that "if, from any cause whatever, the purchase shall not be completed on a day named, the purchaser shall pay interest on the purchase-money, from that day till the completion of the purchase," is inoperative, where a good title has not been shown by the default of the vendor within the time stipulated; but it is operative where it is the result of accident, or of something which could not have been guarded against by the vendor. *Ibid.*

3. A vendor in possession must account for the rents and profits as in the case of a mortgagee in possession. *Sherwin v. Shakspeare*.

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IRREGULARITY.

See DEMURRER.

DISMISSAL.

ORDER OF COURSE.

ORDER TO CHANGE SOLICITOR.

ISSUE.

See SUBSTITUTION.

JOINT TENANCY.

1. Where a testator gives property to a parent and his children *simpliciter*, and he has children then *in esse*, the parent and children take together, either jointly or in common; but if there be superadded words importing a settlement, the parent takes for life, with remainder to his children. *Mason v. Clarke*. 126
2. Bequest "to A." (who was *enceinte* at the time) "and her children." Held, that A. and her children took as joint tenants, and no child having survived the testator, that A. was absolutely entitled to the legacy. *Ibid*.
3. Devise of "my landed estate in *Westmoreland*," with their appurtenances, and all allotments of common now inclosed, to the testator's three daughters, "to be jointly and equally enjoyed or divided in case of marriage of any of them, and they or the survivor, in case of death, are hereby fully authorized

to dispose of the same by will or assignment." Held, that the first words gave the fee, and the second created a joint tenancy, and that the survivor alone had power to devise. *Cookson v. Bingham*.

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4. The testator gave his "personal estate, in money and funds," to his three daughters equally; also all plate and furniture, to be shared like the personal estate; and also to his three daughters all his books, pictures, &c.; also a leasehold house, particularly named. Held, that as to the books and leasehold, the daughters were joint tenants. *Ibid*.

See ESTATE IN FEE, 3.

JUDGMENT.

See ELEGIT.

JURISDICTION.

See TAXATION, 2, 3.

LAPSE OF TIME.

See ABANDONMENT.

CREDITORS' SUIT.

MARRIAGE.

LASTING IMPROVEMENTS.

See TENANT FOR LIFE.

LEASE.

See PRINCIPAL AND AGENT.

LEASEHOLD.

See VENDOR AND PURCHASER, 1.

LEAVING ISSUE.

See DEVISE, 2.

LEGACY.

See ADEMPMENT.

BEQUEST, 2.

SUBSTITUTION.

WILL.

LEGACY DUTY.

1. The Legacy Duty Acts are to be construed strictly, and in favour of the subject. *Hobson v. Neale*.

Page 178

2. A will empowered the trustees, with the consent of A., to sell the real estate, and invest a sufficient sum to answer two annuities. The rents being deficient to pay the annuities, the Court ordered a sale out of the produce, and 20,000*l.* consols were purchased to provide for the annuities. Legacy duty being claimed on the *corpus* of the consols, held, that the validity of this claim depended on whether the sale had taken place under the general jurisdiction of this Court, or under the power in the will; and the Court having held the former, determined that no legacy duty was payable. *Ibid.*

LEGITIMACY.

See ADULTERINE BASTARDY.

LEGATEE.

A testatrix having nephews, named Robert, John, John Henry, Samuel and Thomas, appointed "Robert" her executor, and after a bequest to "John Henry," directed, that if he should not marry, it should be divided between "Samuel," "John," and Mary. Thomas claimed under the gift to "John;" but held, that

he was not entitled, and that John Henry was meant. On appeal however the Court was divided. *Mostyn v. Mostyn*. Page 323

LIFE INTEREST.

See JOINT TENANCY, 1.

LIS PENDENS.

A suit dismissed as against the principal Defendant, and which, though pending as against the others, has yet been practically abandoned, does not prevent the operation of the Statute of Limitations. *Dixon v. Gayfere, Fluker v. Gordon*. 421 See COSTS, 8.

LONG VACATION.

See PRACTICE.

LORD OF MANOR.

It is not necessary for the lord of the manor to appear in Court to consent to a vesting order under the Trustee Act (13 & 14 *Vict.* c. 60, s. 28). *Ayles v. Cox, Ex parte John Attwood*. 584

LUNATIC.

A fund producing upwards of 200*l.* a year, belonging to A. B., a person of unsound mind, though not so found by inquisition, was paid into Court under the Trustee Relief Act. A petition to the *Master of the Rolls* for the application of the income towards his maintenance was refused. *Re Irby*. 334

MAINTENANCE.

See LUNATIC.

MANOR.

Unascertained and undefined advantages will pass under the general words by a grant of a manor, although not in the contemplation of either party at the time. Thus, for instance, the minerals in the lord's waste would pass, although their existence was neither known nor suspected by any of the parties to the contract. So also the advowson to a living will pass with a manor by general words, though not specifically named in the grant. *Attorney-General v. Evelme Hospital.* Page 366
See HOSPITAL.

LORD OF MANOR.

MARRIAGE.

After a lapse of twenty-eight years a consent to marriage, so as to avoid a forfeiture, was, under the circumstances, presumed. *Re Adrian Birch.* 358
See PRESUMPTION, 1.

MARRIAGE SETTLEMENT.

A sum of 865*l.* stock, partly belonging to the husband and partly to the wife, was settled (subject to the interests given to the husband, wife and children) as to the husband's part on the husband's executors, and as to the wife's to her next of kin. The settlement contained a covenant, that the after-acquired property of the wife should be settled on like trusts. Held, that the husband and wife's representatives were, under the ultimate limitation, entitled to the wife's after-acquired property, in propor-

tion to their interests in the 865*l.* *Stevens v. Van Voorst.* Page 305
See COVENANT.

POWER TO APPOINT NEW TRUSTEES.

POWER TO LEND.
SETTLEMENT.

MASTER OF HOSPITAL.

See HOSPITAL.

MASTER.

See SCHOOL.

MASTERS.

See WINDING-UP ACTS.

MERGER.

See HOSPITAL.

MINES.

Observations as to the doubtful and speculative character of mining operations. *Jennings v. Broughton.* 234

MISREPRESENTATION.

1. Where a party, by misrepresentation, draws another into a contract, such party may be compelled to make good the representation, if that be possible; but if it be impossible, the person deceived may avoid the contract. The same principle applies, though the party, at the time, believed the statement to be true, if in the due discharge of his duty, he ought to have known otherwise. *Pulsford v. Richards.* 87
2. Third parties, who by false representations induce others to enter into contracts, are estopped

from afterwards falsifying their statement, and, if necessary, may be compelled to make them good. But the false statement of one, not a party to the agreement entered into on the faith of it, is not a ground for avoiding it. *Pulsford v. Richards*. Page 87

3. Misrepresentations may be either by a suppression of the truth or an assertion of what is false; but to be the ground for avoiding the contract, the representation must be one "*dans locum contractui*," or such that it is reasonable to infer, that in its absence the party deceived would not have entered into the contract. *Ibid*.

MONASTERIES.

See HOSPITAL, 2.

MORTGAGE.

1. *A.* conveyed lands to *B.*, on trust, in case a sum and interest should not be paid by a day named, to sell, and after payment of principal, interest and costs, to reconvey the lands remaining unsold, or pay over the residue of the money; and *B.* covenanted not to sell without giving six months' notice, but the deed contained no proviso for redemption. Held, that this was a mere mortgage, and that *A.* was therefore entitled to six months' time to redeem. *Bell v. Carter*. 11
2. A mortgagee, notwithstanding the interest mortgaged is reversionary, can only recover six years' arrears of interest as against the land mortgaged, although he may recover

twenty years' arrears on the covenant to pay. *Sinclair v. Jackson*.

Page 405

3. The interest on money secured by mortgage of land and by covenant being sixteen years in arrear, the mortgagee filed his bill of foreclosure against the heir of the mortgagor, raising no question of liability on the covenant or of any right of tacking. A decree was made to take an account of what was due on the mortgage. Under the Statutes of Limitation, twenty years' arrears could be recovered on the covenant, but six only as against the land. The Master refused to allow the Plaintiff to tack his two claims. Held, on exceptions, that he was right. *Sinclair v. Jackson*. 405
4. Whether the right to tack in such a case would be different in a suit for foreclosure, from what it is in a suit for redemption, *quære?* *Ibid*. See FORECLOSURE.

RECEIVER, 1.

MORTGAGOR AND MORTGAGEE.

See FORECLOSURE.

MORTGAGE.

NEXT OF KIN.

1. Trust funds were settled upon a husband for life, and if the wife should die in the lifetime of the husband, then, after his decease and failure of issue, "for such persons (other than the husband) as should *then* be the next of kin of the wife, and would have been

entitled thereto under the Statute of Distribution, in case she had died sole, unmarried and intestate." Held, that her next of kin, at her own death, and not those at the death of her husband, were entitled. *Wheeler v. Addams*. Page 417

2. In a limitation by deed, on a particular event, to the "then" next of kin of *A.* the word "then" was held to refer to the event and not to the time of its happening. *Ibid.* See EXECUTOR.

NOMINATION.

See HOSPITAL, 1, 4, 5.

NOTICE.

See CANAL.

"OR" READ "AND."

A testator devised an estate in fee to his son, but if he should die under twenty-one, over. By a codicil, he limited the estate over, in the event of the son dying without issue "or" under twenty-one. Held, that "or" must be read "and," and that the executory devise over took effect only on the happening of both events, and consequently, that *A.*, on attaining twenty-one, had an absolute estate in fee simple. *Morris v. Morris*.

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ORDER OF COURSE.

When a demurrer has been overruled, and an appeal from the order is pending, an *ex parte* order to amend is irregular; and a Plaintiff having obtained such an order, after he had notice that the appeal

had been set down, it was discharged with costs, and the amendments were expunged. *Ainslie v. Sims*. Page 174

See TAXATION, 1.

ORDER TO CHANGE SOLICITOR.

A country solicitor agreed to employ a town agent for fifteen years. Before the expiration of the term, he obtained an order of course, in a suit, to change the agent, suppressing the existence of the special contract. The order was discharged for irregularity, with costs. *Richards v. The Scarborough Market Company*. 83

OUTSTANDING ESTATE.

Part of the testator's property being, at his death, invested on insufficient securities, an inquiry was directed (though the tenant for life was entitled to enjoy it *in specie*), whether any and which of the outstanding debts due to the testator should be got in. *Crowe v. Crisford*. 507

PARAPHERNALIA.

1. Old family jewels do not constitute *paraphernalia*. *Jervoise v. Jervoise*. 566
2. Pearl ornaments presented to a married woman by a third party, held to be part of her *paraphernalia*. *Ibid.*
3. So, likewise, brilliant bracelets bought by the husband and given to the wife, though worn with the

family jewels, constitute part of her *paraphernalia*. *Jervoise v. Jervoise*. Page 566

PARENT AND CHILD.

See JOINT TENANCY, 1.

PARTIES.

See RECEIVER, 1.

PARTNERS.

See PARTNERSHIP.

PARTNERSHIP.

1. Surviving partners held, by inference deduced from their conduct, to have carried on their business on the same terms as the original partners. *King v. Chuck*. 325
2. In a partnership between *A.*, *B.* and *C.*, there was a stipulation, that if one died, the survivor should take the business and pay his executors his capital, as appears on the last account. *A.* died, and *B.* and *C.* continued to carry on the business without articles. *B.* afterwards died. The Court, from the conduct of the parties, inferred that *B.* and *C.* carried on their business on the same terms, as to winding-up on the death of either, as those which applied to the first partnership between *A.*, *B.* and *C.*, and decreed *C.* to pay to *B.*'s executors his capital, as appearing on the last account. *Ibid.*

PATENT.

On a motion for an injunction to restrain the alleged infringement of a patent, the Defendant insisted, first, on the invalidity of the pa-

tent; and, secondly, that he had not infringed it, and an action was directed. Afterwards, the Defendant pleaded in equity simply the want of novelty of the patent. This Court, on allowing the plea, gave the Plaintiff liberty to apply to modify the order made on the application for the injunction, so as to make it conformable to the issue tendered by the plea. *Young v. White*. Page 532

See PLEA.

PATRONAGE.

See HOSPITAL.

PAYMENT INTO COURT.

An executor, for some years, received the rents of property specifically bequeathed. The specific legatee having instituted a suit against him, held, that he could not set up the adverse title of a third party as a defence to a motion to pay the amount into Court. Held also, that the executor was not entitled to deduct the amount of debts, &c. paid by him, there having apparently been sufficient general assets out of which they ought to have been paid. *Lord v. Purchase*. 171

PAYMENT OUT OF COURT.

A. B., who was entitled to a fund in Court, assigned it to *C. D.*, who was resident in *India*. *C. D.* appointed *E. F.* his attorney in *England*. On the joint petition of *A.*

B., C. D. and E. F., the fund was paid out to E. F. Fell v. Jones.

Page 521

PERISHABLE PROPERTY.

A testator gave his freehold, copyhold and leasehold estates, and all his stocks, shares and personal estate, to trustees, in trust to receive the "rents," issues and profits, and thereout to keep the houses, &c. in good, substantial and tenantable repair, and renew his leaseholds, &c., and then to pay "the net income arising from the residuary real and personal estate" to his wife for life. Held, first, that the wife was entitled to enjoyment *in specie*; and, secondly, that all ordinary repairs were to be paid out of the income, but not such extraordinary repairs as would amount to rebuilding the houses. *Crome v. Crisford.* 507
See OUTSTANDING ESTATE.

PETITION.

See FORECLOSURE, 1.

PAYMENT OUT OF COURT.

RAILWAY, 4.

TRUSTEE ACT.

PLAINTIFFS.

See CO-PLAINTIFFS.

PLEA.

1. When a bill alleges facts, which, if true, would contradict or be evidence to discredit a plea, the plea must be supported by an answer, denying, or at least, if not, giving the Plaintiff discovery as to those facts. *Hunt v. Penrice.* 525
2. A Plaintiff claimed as remainder-

man upon default of issue of *A. B.* The Defendant pleaded that *A. B.* left issue one child, viz. himself, the Defendant. Held, that the plea was informal, it not being accompanied by an answer to charges in the bill, that *A. B.*, in her correspondence with her family, never alluded to her being pregnant, or referred to the Defendant otherwise than as her adopted child, &c. &c. *Hunt v. Penrice.* Page 525

3. To a bill for the infringement of a patent, the Defendant pleaded, that the Plaintiff was not the first inventor. Held, that the Defendant need not answer any fact alleged by the bill which would not be evidence to go to a jury on such an issue. As, for instance, the accuracy of the specification; the novelty of the process; the assignment of the patent; the expenditure of money on it; the obtaining *Scotch* and *Irish* patents for the process; allegations as to the opinions of third parties as to the invention, and the truth of the assertions of third parties respecting it, &c. &c. *Young v. White.* 532
See PATENT.

PLEADING.

See CO-PLAINTIFFS.

MORTGAGE, 3.

PLEA.

PURCHASER FOR VALUABLE CONSIDERATION.

POWER.

1. The donee of a power of selection cannot lawfully exercise his power, in such a manner, as to secure an

advantage to himself, by any stipulation or arrangement with the appointees in whose favour the power is exercised. *Askham v. Barker.* Page 37

2. The burden of proving the invalidity of an appointment lies on the person who seeks to set it aside; and not only the deed, but the whole matter, and all the accompanying facts, must be examined, in order to ascertain the real nature and character of the transaction. *Ibid.*

3. A tenant for life had the power of appointing the settled property amongst such of his children as he should think fit. The trustees had, in breach of trust, lent him part of the trust monies, without taking any security. In 1834, the tenant for life appointed to his daughters the money so lent and 500*l.* in exclusion of his son. Contemporaneously, the daughters exchanged the sum so appointed for an estate of the father, and the old trustee retired. The transaction was supported, the estate being worth the amount given in exchange. *Ibid.*

4. *A. B.*, having a testamentary power over real estate in favour of his children, devised all the real estates, of or to which he was seised or entitled, "or of which he had power to dispose or to appoint by that his will," on trusts for his children and for other uses exceeding his authority. Held, that the will was an execution of the power. *Banks v. Bank.* 352

See PRINCIPAL AND AGENT.

POWER OF ATTORNEY.

See PAYMENT OUT OF COURT.

POWER OF SALE.

See CHARGE ON REAL ESTATE.

POWER TO APPOINT NEW TRUSTEES.

1. Two retiring trustees held not authorized to appoint two new trustees, under a power given to surviving or continuing trustees. *Stones v. Rowton.* Page 308

2. Two trustees were originally appointed by a settlement, which contained a power that if the trustees or either of them should be desirous of being discharged, the tenant for life, "and after his decease, the surviving or continuing trustees or trustee" might appoint any other person or persons to be a trustee or trustees, in the stead of the trustee or trustees so desiring to be discharged. Held, that they did not authorize the two original trustees, after the death of the tenant for life, to retire together and appoint two new trustees in their stead. *Ibid.*

See COSTS, 8.

POWER TO LEND.

Under a power to lend 2,500*l.* of the trust funds to the tenant for life, held, that it was not exhausted by one loan, but, after repayment, the power might be exercised a second time. *Versturme v. Gardiner.* 338

Page 521

A testator gave his freehold, copyhold and leasehold estates, and all his stocks, shares and personal estate, to trustees, in trust to receive the "rents," issues and profits, and thereout to keep houses, &c. in good, substantial and tenantable repair, and his leaseholds, &c., and pay "the net income of the residue of the real estate" to his wife for life; first, that the same should be enjoyed by her

WIFE, 3.
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WIFE, 3.
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 DOCUMENTS.
 COURSE.
 SOLICITOR.
 COURT.
 COURT.
 DOCUMENTS.
 RECEIVER.
 COSTS.
 ACT.

A testator gave all his real and personal property to his widow, her heirs, &c. "absolutely, and forever, in the full assurance and confident hope" that she would bring up, educate and provide for his children, as it would have been his intention "if living. Held, that though the words "full assurance and confident hope" would create a precatory trust, yet the trusts were

P' PRESUMPTION.

A legacy was given, conditionally, on a marriage with the consent of the trustees. The marriage took place in 1825, and the party entitled to the legacy in default never raised any question as to the consent having been given until 1852, after the death of the trustees and of A. B. Held, that in every thing was to be presumed in favour of the consent; and though there was no distinct proof of consent, yet it was presumed from the conduct of the trustees subsequent to the marriage. *Re Adrian Birch*.

358

2. After a long possession, the Court will make great presumptions, including, in some cases, even an Act of Parliament, in order to protect right. The Court will not, however, adopt such presumption, when the origin of the right or possession is clearly ascertained and negatives such presumption. *Attorney-General v. Welme Hospital.* 366

366

See EVIDENCE, 1.

PARTNERSHIP.

A power to a land agent to "manage and superintend estates," authorizes him, on behalf of his principal, to enter into an agreement for the usual and customary leases, according to the nature and loca-

ty. *Peers v.*
Page 151

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not bound to set
documents in his
relating to his own title.
and v. Sutherland. 209
INSPECTION OF DOCUMENTS.

PROMISSORY NOTE.

See STATUTE OF LIMITATIONS, 2, 3.

PROSPECTUS.

See PUBLIC COMPANY.

PUBLIC COMPANY.

1. Persons who take shares on the formation of a company, and the directors who form it, are contracting parties, and the prospectus issued is a representation "*quæ dat locum contractui.*" *Pulsford v. Richards.* 87
2. A right to make a foreign railway was conceded to C. and the four Defendants, and the grant was partly obtained through the influence and exertions of C., whose name was inserted for the benefit of the Defendants. The Defendants agreed to appoint C. their agent for the construction, &c. of the line, and in consideration of such services, to pay him 4l. per cent. on the outlay. After this, they issued a prospectus for the formation of a company, proposing to transfer the grant and all benefits to the company, subject to a

stated reservation to themselves; but they omitted to mention anything respecting the contract with C. The Plaintiff took shares on the faith of the prospectus, and afterwards sought to return them and set aside his contract, on the ground of misrepresentations in the prospectus. The Court considered that the duties to be performed by C. were important and indispensable, and that he was peculiarly fitted for them; that there was no evidence of the value of his services, but assuming the remuneration to be excessive and exorbitant, still that it did not furnish a ground for annulling the contract, though it might possibly be a reason for charging the directors. *Pulsford v. Richards.* Page 87

3. Projectors of a railway retained 4,000 shares for themselves, but did not state the fact in their prospectus. Held, not to be a ground for annulling a contract to take shares in the concern. *Ibid.*

See COMPANY.

CONTRIBUTORY.

RAILWAY, 1, 2, 3.

SPECIFIC PERFORMANCE.

WINDING-UP ACTS.

PURCHASER FOR VALUABLE CONSIDERATION.

The defence of being a purchaser for valuable consideration without notice, is available in equity against a legal as well as against an equitable title and also as against a charity. *Attorney-General v. Wilkins.* 285

PURCHASE-MONEY.

1. Under a trust to pay a specified debt of the testator and debts generally, a purchaser of the estate is not bound to see the specified debt paid. *Robinson v. Lowater*.

Page 592

2. When there is a charge of debts generally, or of legacies and debts generally, a purchaser is not bound to see to the application of the purchase-money, but *secus* when the trust is to pay schedule debts or legacies simply. *Ibid.*
3. The case of *Doe d. Jones v. Hughes* (6 *Exch. Rep.* 223) observed upon. *Ibid.*

RAILWAY.

1. A railway company held not bound by a contract entered into by the projectors prior to their incorporation. *Preston v. The Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway Company*.

114

2. The projectors of a railway company entered into a contract with a landowner for the purchase of the land required. Subsequently the act passed establishing and incorporating the company. The company abandoned the undertaking, without having done anything to adopt the contract, except by staking out the intended line. Held, that the company were not bound, the contract not being under the corporate seal, and there being no sufficient adoption of it. *Ibid.*

3. A railway company, having applied for an act to extend their line, was opposed by a landowner; whereupon an agreement was entered into between the solicitor of the company and the landowner, that the latter should withdraw his opposition, and if the act passed, that the company should purchase his land on certain terms. Neither the appointment of agent nor the agreement was under the seal of the corporation. The act passed, but the company did not take the land. The Court, considering that the company had done no act to take the benefit of the contract, refused a decree for specific performance, and declined to order the company to admit the validity of the contract, in order to enable the Plaintiff to try his right at law. *Gooday v. The Colchester, &c. Railway Company*.

Page 132

4. The purchase-money for settled lands taken by a railway was paid into Court, and after a contract had been entered into for laying it out in land, a petition was presented for its temporary investment in the funds. Held, that the proceeding was not vexatious, and that the company ought to pay the costs. *Re The Liverpool, &c. Railway*.

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REAL AND PERSONAL ESTATE.

See CONVERSION.

REAL ESTATE.

See CHARGE ON REAL ESTATE.

RECEIVER.

1. Where *A.* and his incumbrancers, *B.*, *C.* and *D.*, joined in the appointment of a receiver, who covenanted to keep down the incumbrances, according to their priorities, and pay the surplus to *A.* Held, that a subsequent mortgagee from *A.* could not sustain a bill against the receiver and *A.* for an account of the rents and an injunction against paying the surplus to *A.* in the absence of *B.*, *C.* and *D.* *Ford v. Rackham.* Page 485
2. A receiver will not be appointed without sureties, though not objected to, if persons not competent to consent are interested. *Tylee v. Tylee.* 583

REDEMPTION.

See MORTGAGE, 1.

REMOTENESS.

Devise of real estate to *A.* for life, and after his decease to all his children share and share alike, and all their children and their heirs, but in default of issue of *A.* to *B.* and *C.* and their children, the mothers and children and their heirs to share the rents equally, as had been directed with regard to the children of *A.* Held, that the gift to *B.* and *C.* was not too remote, and that they and their children living at the death of the testator took as tenants in common in fee. *Cormack v. Copous.* 397
See TENANCY IN COMMON, 1.

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RESCINDING CONTRACT.

See COMPANY.

RESIDUARY LEGATEE.

See EXECUTOR.

REVISING BARRISTER'S COURT.

See TAXATION, 3.

REVOCATION.

1. The testator appointed *A.*, *B.* and *C.* his executors and trustees, and devised and bequeathed to them his real and personal estate on trust. By a codicil he desired that *A.*, named in his will as "executor," be no longer such, and he nominated *D.* to succeed him, but he made no alteration in the devise. Held, that *A.* still remained a trustee of the will. *Cartwright v. Shephard.* Page 301
2. A testator appointed *A.*, *B.* and *C.* to be trustees and executors. He revoked the appointment of *C.* as executor and trustee by his first codicil. By a second codicil he revoked the appointment of *B.* and *C.* as executors, but ratified his will except as altered thereby. Held, that the first codicil was not revoked, and that *C.* was not a trustee. *Ibid.*

SALE.

See CHARITY, 3.

FORECLOSURE, 2.

U U

SATISFACTION.

See TENANT FOR LIFE.

SCHEME.

See CHARITY, 5.

SCHOOL.

In a school the first object is to provide a proper remuneration for a competent master, and this ought not to be interfered with, by the institution of exhibitions and scholarships, however useful in themselves. *Attorney-General v. Archbishop of York.* Page 495

SCHOOLMASTER.

See CHARITY, 3, 6.

SEAL.

See RAILWAY, 3.

SECURITY FOR COSTS.

A Plaintiff, carrying on business and domiciled in *Scotland*, took furnished lodgings in *London*, and then filed his bill. Held, that he must give security for costs. *Ainslie v. Sims.* 57

SEPARATE ESTATE.

A married woman, having separate estate, directed a solicitor, in writing, to take proceedings for her and her children in certain suits. The suits did not, however, in any way relate to her. She was no party thereto, but her children only were made parties by their next friend. Held, that her separate estate was not liable for the costs. *Re Pugh.* 336
See HUSBAND AND WIFE.

SET-OFF.

A creditor of an intestate purchased part of the intestate's goods from his administrator. Held, that he could not set off the amount against a debt due to him from the intestate at his decease. *Lambarde v. Older.* Page 542

SETTLEMENT.

1. A testator, by his will, gave real and personal property to his daughter *A.* absolutely; but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children equally after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share;" and, in default of such children or other issue, over. Held, that the property must be settled in trust for *A.* for life, to her separate use, without power of anticipation; and, after her decease, upon trust for such of her children as should survive her, and for the issue living at her death of such of her children as should not survive her, equally, as tenants in common, the issue to take *per stirpes*, but *inter se* equally as tenants in common. *Turner v. Sargent.* 515
2. That there should be limitations in the nature of cross-remainders in favour of such of the children and issue as should survive *A.* in re-

spect of the share of any child dying in her lifetime without leaving issue, and in respect of the share of any issue of any child similarly dying. *Turner v. Sargent*.

Page 515

3. That the realty should be settled as realty; and as the testator, by simply directing a settlement, must have intended, with powers of leasing and sale and exchange, and with a receipt clause; and that the settlement should contain provisions for maintenance, education and advancement, and power to appoint new trustees. *Ibid*.

See HUSBAND AND WIFE.

NEXT OF KIN.

POWER TO APPOINT NEW TRUSTEES.

SHARES.

See SPECIFIC LEGACY.

SOLICITOR.

A solicitor who had been struck off the roll for misconduct restored, after a lapse of ten years, during which, amidst great privation and suffering, he had maintained an irreproachable character, the application being supported by a memorial signed by a very large number of solicitors and unopposed by the Law Institution, and opposed by one individual solicitor only. *Anonymous*. Page 475

SOLICITOR AND CLIENT.

1. A client having withdrawn from a litigation, his solicitor agreed to take one-third of his bill in full discharge if the suit failed (which was to be carried on for the benefit

of another party), and the client agreed to pay the remaining two-thirds if it succeeded. The Court refused, eight years afterwards, when the suit had succeeded, to open the transaction by ordering a taxation of the bill. *In re Moss*.

Page 340

2. An agreement, pending a litigation, that a solicitor shall be entitled to compound interest on his demand, cannot be supported. *In re Moss*. 346

3. The settlement of a solicitor's bill by the client for a fixed sum is valid, and will not be disturbed by the Court, when it has been entered into fairly, and with proper knowledge on both sides. *Stedman v. Collett*. 608

4. Several years after a solicitor had ceased to act for his client, an agreement was entered into between them for the delivery up of the client's papers, in consideration of a fixed sum to be paid to the solicitor when the Court of Chancery should declare that he was one of the next of kin of *E. S.* and entitled to a fund in Court. No bill was delivered, and five years after the right of the client was established. Held, that the agreement was valid, there having been no fraud or undue preference, the client having had the full benefit of the agreement, and it being impossible to replace the parties in their original position. *Stedman v. Collett*. 608

See ORDER TO CHANGE SOLICITOR.

SEPARATE ESTATE.

TAXATION.

SPECIAL CASE.

See COSTS, 4.

SPECIFIC LEGACY.

A testator bequeathed to his daughter his twenty shares in the *S.* office, or in any other office in which the same had been or should be transferred, and all his right therein, or in the monies arising or that might arise from the sale thereof. Negotiations, of which the testator was aware, were then pending, for the transfer of the business of the *S.* office to the *A.* office, which were afterwards concluded, and, in lieu of the *S.* shares, the testator received a number of *A.* shares and a sum of 1,200*l.* Held, that the *A.* shares passed under the bequest, but that the money did not. *Phillips v. Turner.* Page 194

See ADEMPMENT.

SPECIFIC PERFORMANCE.

The Defendant agreed, in writing, to takeshares in a joint-stock company (which were transferable), "and to execute the deed of settlement when required." Specific performance was refused. *The Sheffield Gas Consumers' Company (registered) v. Harrison.* 294

See RAILWAY, 3.

VENDOR AND PURCHASER, 1.

STATUTE.

6 *Geo.* 4, c. 16.

See ESTATE TAIL.

3 & 4 *Will.* 4, c. 27.

See MORTGAGE, 2.

STATUTE OF LIMITATIONS, 4.

7 *Will.* 4 & 1 *Vict.* c. 26.

See STATUTE OF WILLS.

1 & 2 *Vict.* c. 110.

See FORECLOSURE, 2.

10 & 11 *Vict.* c. 96.

See TRUSTEE RELIEF ACT.

12 & 13 *Vict.* c. 74.

See TRUSTEE RELIEF ACT.

15 & 16 *Vict.* c. 86, ss. 15, 40.

See CROSS-EXAMINATION.

15 & 16 *Vict.* c. 86, s. 36.

See EVIDENCE, 3.

16 & 17 *Vict.* c. 137.

See CHARITABLE TRUSTS ACT.

STATUTE OF LIMITATIONS.

1. The claim for arrears of an annuity given by will beyond six years held not barred by the statute, there being trust for the payment. *Playfair v. Cooper, Prince v. Cooper.* Page 187
2. In a case unaffected by Lord Tenterden's Act, the words "interest on this note paid up to the 13th day of May, 1825," indorsed upon a promissory note in the handwriting of a person who was in the habit of transacting business for both the maker and payee of the note, was held sufficient to take the note out of the operation of the statute. *Briggs v. Wilson.* 330
3. The maker of the note died in 1829, having charged his real estate with payment of his debts; the payee died in 1851, but, after the death of the former, an arrangement was made by the trustee of his will with the payee that interest should be payable till the death of the latter. Held, that the remedy was not barred. *Ibid.*
4. Though by the Statute of Limita-

tions (3 & 4 Will. 4, c. 27, s. 34), the right is extinguished at the end of twenty years, still adverse possession by a succession of independent trespassers, for a period exceeding twenty years, confers no right on any one of them who has not himself had twenty years uninterrupted possession, except as furnishing a defence to a trespasser in possession against an action by the rightful owner. *Dixon v. Gayfere, Fluker v. Gordon.* Page 421

5. After both the trustee and *cestui que trust* had been out of possession more than twenty years an ejectment was brought by *A. B.*, the heir of the trespasser, in the name of the trustee, and he obtained judgment. The trustee, who, disclaiming all personal interest, then instituted a suit, seeking to have the rights declared as between the rightful owner and the heir of the trespasser, and the Court, by its receiver, took possession. *A. B.* afterwards instituted a suit against the trustee and the rightful owner to recover the property. Held, that the Court being in possession, the Statute of Limitations had conferred no right, and did not apply. *Dixon v. Gayfere, Fluker v. Gordon.* 421

6. *A.* wrongfully entered and died intestate: his widow entered. Held, that the possession of the widow was not a continuance of that of her husband, it not being shown that she was entitled to dower, and such a right not entitling her to enter into the whole estate. *Ibid.* See *LIS PENDENS.*

MORTGAGE, 2, 3, 4.

PURCHASER FOR VALUABLE CONSIDERATION.

STATUTE OF WILLS.

The 29th section of the Statute of Wills has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one," which additional words, upon the authority of decided cases, modify their meaning. *Morris v. Morris.* Page 198

SUBSTITUTION.

A testator gave his personal estate to *A.* for life, and after the decease of *A.* he directed his executors to divide it among the six children of his late sister *A. J.* (naming them), "who should be living at the time of his decease, and the issue of such of them as should be living at the time of his decease, and the issue of such of them as should then be dead, leaving issue then living, the issue to take only such part or share as their parents, if then living, would have taken." If any of the children should die without leaving issue, his or her share was to go over to the others; and if any of the children should die leaving issue, they were to take as therein mentioned. All the six children of *A. J.* survived the testator and the tenant for life, and some of them had issue. Held, that the six children were entitled to the fund absolutely, and that, in the events which had happened, their issue took nothing. *Johnson v. Cope.* 561

See BEQUEST.

SUPPRESSION.

See DEMURRER.

ORDER OF COURSE.

SURVIVORSHIP.

See CLASS.

TACKING.

See MORTGAGE, 3, 4.

TAXATION.

1. A solicitor entered into a special agreement with his client for interest on his bill, with annual rests, and for a charge on the estate recovered. Held, that this was not a proper case for an order of course for taxation, and such an order was discharged. *Re Moss*. Page 59
2. In 1851, *A.* and *B.* agreed to charge their real estates with the amount of costs due to their solicitor, with annual rests. The solicitor instituted a suit to enforce the lien, and the client presented a petition for taxation. The Court made the usual order for taxation, with a direction to the Master to ascertain the amount due in 1851, but held itself incompetent, on this occasion, to deal with the question of lien. *In re Moss*. 346
3. The Court of a revising barrister is not "a Court of Law" within the Solicitors' Act, so as to exclude the jurisdiction of this Court to order the taxation of a bill containing items for business done in that Court. *In re Andrews*. 510
4. It requires a very special case to induce the Court to order taxation after payment, the Court being reluctant to open a matter delibe-

rately settled. The rule is, that there must be both pressure and overcharges, or items in the bill itself of such a nature as to amount to what is vaguely called fraud.

In re Barrow. Page 547

5. The doctrine of pressure, in cases of taxation after payment, is not to be extended, and the application for taxation should be made speedily. *Ibid.*
6. Where a mortgagor seeks a taxation of the bill of the mortgagee's solicitor, it must be looked at not as between the mortgagor and the solicitor, but as between the solicitor and his client, the mortgagee. *Ibid.*
7. Where a considerable portion of a bill of costs is for business, which, in the exercise of an honest and fair discretion, ought never to have been transacted, the Court, although there be no serious amount of pressure, will order a taxation after payment. *Ibid.*

See COSTS, 6.

SOLICITOR AND CLIENT.

TENANCY IN COMMON.

1. Bequest of personal estate to *A.* for life, remainder to the children of *A.* equally, and in default of issue of *A.*, upon trust to sell and divide equally amongst *B.* and *C.* and all their children "then" living, share and share alike. Held, that the gift was not too remote, and that *B.* and *C.* and their children living at the death of *A.* took the personal estate as tenants in common absolutely. *Cormack v. Copous*. 397

2. *B.* died before *A.*, but nevertheless she was held to take a share both in the realty and personalty. *Cormack v. Copous.* Page 397
See JOINT TENANCY, 1.

TENANT.

A bill filed against trustees and the tenant to prevent equitable waste was dismissed with costs as against the tenant, it not being shown that he had committed or intended to commit any waste, though some had been committed by the trustees at his request. *Campbell v. Allgood.* 623

TENANT FOR LIFE.

The tenant for life under a settlement voluntarily expended monies in erecting necessary buildings on the trust property. He also paid the expenses of the investment of the trust funds in law. Held, that his executors could not set off this outlay as a satisfaction *pro tanto* of a covenant on his part to pay 3,000*l.* to the trustees of the settlement. *Horlock v. Smith.* 572

See OUTSTANDING ESTATE.

PERISHABLE PROPERTY.

TENANT FOR LIFE AND RE-MAINDEMAN.

See ARREARS.

" THEN."

See NEXT OF KIN.

TIMBER.

See EQUITABLE WASTE.

TREES.

See EQUITABLE WASTE.

TRUST.

See EXECUTOR.

PRECATORY WORDS.

STATUTE OF LIMITATIONS, 1.

VISITOR, 2.

TRUSTEE.

See COSTS, 8.

EQUITABLE WASTE.

POWER, 1, 2, 3.

POWER TO APPOINT NEW TRUSTEES.

REVOCATION.

STATUTE OF LIMITATIONS, 5.

TRUSTEE ACT,

13 & 14 *Vict.* c. 60.

After a decree for the sale of an intestate's copyhold estate in lots, but before the sale, the infant heir of the intestate was admitted. Held, that a petition for a vesting order was properly presented by the purchaser, whose money was in Court, and that the costs of the order were to be borne by the vendors, and to be paid out of the purchase-money of the particular lot, and not out of the fund in Court generally. *Ayles v. Cox, Ex parte John Attwood.* Page 584
See MANOR.

TRUSTEE RELIEF ACT.

A. B. purchased an estate, subject to a pecuniary charge. Held, that he was not entitled to pay the amount of the charge into Court under the Trustee Relief Act. *In re Buckley's Trust.* 110

See CHARITABLE TRUSTS ACT.

LUNATIC.

TRUSTEES' RECEIPTS.

A testator ordered his debts to be paid by his executors, and, after giving legacies, he gave the residue of his real and personal estate, subject as aforesaid, to *A.*, and he appointed *A.* and *B.* executors. Held, that if the legacies were charged on the real estate the debts must also be charged thereon, and that therefore *A.* was able to give valid receipts for the purchase-money of the real estate, which relieved a purchaser from the necessity of seeing to its application. *Dowling v. Hudson.* Page 248
See PURCHASE-MONEY.

TRUST FOR PAYMENT OF DEBTS.

See PURCHASE-MONEY.

UNDERTAKING.

See WARD OF COURT, 2.

VENDOR AND PURCHASER.

1. Leaseholds were sold under the Court, described as "a BONDED sugar refinery," and the lease was referred to, which contained no such restriction. The abstract showed a prior agreement for the lease of the premises, to be used "for refining sugar IN BOND." The purchaser accepted the title, paid his purchase-money into Court, and was let into possession. The lessors afterwards instituted a suit to rectify the lease, by introducing

the restriction. The Court refused to compel the final completion of the purchase, or part with the purchase-money, until the result of the suit was known. *Bentley v. Craven.* Page 204

2. Unless a valid acceptance be given, within a reasonable time, to a written offer to sell an estate, it will be treated as abandoned. *Williams v. Williams.* 213
3. In 1827, *A.* wrote to *B.* that he had credited *B.*'s account with 220*l.*, in consideration of an agreement by *B.* to convey two houses. The abstract was delivered, but there was no acceptance in writing on the part of *B.* Five years afterwards, *B.* filed a bill against *A.* for specific performance. *A.* swore, and it was not denied, that in 1827 he abandoned the contract, and that in 1829 it was considered broken off by both parties. It appeared, however, that *B.* had, in the meantime, the benefit of the credit for 220*l.* The Court dismissed the bill on the ground of the delay. *Ibid.*

See ABSTRACT.

CONDITIONS OF SALE.

COSTS, 1, 2, 5.

INTEREST ON PURCHASE-MONEY, 1, 2.

PURCHASE-MONEY, 1.

SPECIFIC PERFORMANCE.

TRUSTEE ACT, 13 & 14 *Vict.* c.60.

TRUSTEES' RECEIPTS.

WILL.

VISITOR.

1. In practice, the office of visitor of

a charity has become merely nominal, its duties and functions being rarely spontaneously performed. *Attorney-General v. St. Cross Hospital.* Page 435

2. In cases of charitable trusts, the Court has authority to see them properly performed, notwithstanding there may be a special or general visitor. *Ibid.*

VOLUNTARY GIFT.

1. This Court will not assist a volunteer by making effectual an incomplete gift. *Weale v. Ollive.* 252
2. *A. B.* directed the certificates of some United States Bank shares standing in his name to be delivered to his nephew, and in a letter to him stated, that "he made a free gift of them" to him. *A. B.* also executed a power for transferring the shares, but which was not acted on in *A. B.*'s life. The shares, being found in *A. B.*'s name at his death, were held to form part of his personal estate. *Ibid.*

VOLUNTEER.

See VOLUNTARY GIFT.

WARD OF COURT.

1. Generally, upon the marriage of a ward of Court without leave, the marriage being found valid, and the party in contempt having executed the settlement and paid the costs, is discharged. *Field v. Brown.* 146
2. *A. B.* was committed for contempt for marrying a ward. After the marriage had been found valid, but

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before a settlement had been executed, he was discharged upon his undertaking to abstain from any intercourse. After the settlement had been executed, the Court held, that it would be contrary to all principle either to compel the continuance of the undertaking or to make an order to the same effect. *Field v. Brown.* Page 146

WASTE.

See EQUITABLE WASTE, 1.
TENANT.

WILL.

A testator, in 1836, devised all his real estate to his wife, and appointed her executrix. He afterwards purchased an advowson and died. The widow proved this will, and sold the advowson. An objection being made that the after-purchased property did not pass, a search was made, and another testamentary instrument of 1847 was found, purporting to confirm a will of 1826. Held, that the purchaser was entitled to the same amount of proof of the codicil of 1847 as would be necessary to establish against the heir, and that it ought to be proved in the Ecclesiastical Court. *Weddall v. Nixon.*

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See ABSOLUTE INTEREST.

ADEPTION.

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WINDING-UP ACTS.

A company may be wound up in chambers under the acts 1848 and 1849, instead of by the Master.
Re The Newcastle, Shields and Sunderland Union Bank, and in the Matter of the Winding-up Acts, 1848, 1849. Page 470

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